

Case No. 11-3868

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

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MATTHEW HALE,  
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,  
Respondent-Appellee.

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Appeal from the United States District Court  
For the Northern District of Illinois  
Civil Case No. 08-cv-00094-JTM  
The Honorable Judge James T. Moody

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**BRIEF AND REQUIRED SHORT APPENDIX OF  
PETITIONER-APPELLANT MATTHEW HALE**

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United States District Court for the  
Northern District of Indiana

Trial Judge

I hereby certify that, to the best of my knowledge, the preceding list is a complete list of all parties having an interest in the outcome of this case.

*s/Clifford J. Barnard*

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STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF  
ILLINOIS, THE HONORABLE  
JUDGE JAMES T. MOODYCase No. 08-cv-00094-JTM

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**BRIEF OF APPELLANT MATTHEW HALE**

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**I. STATEMENT OF JURISDICTION**

The district court had jurisdiction pursuant to 28 U.S.C. § 2255.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the district court has made a final adjudication on the merits and because this Court has issued a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(2). Judgment entered on October 27, 2011 when the district court denied Hale's Rule 59 motion to alter or amend judgment. *See* F.R.A.P. 4(a)(4)(A)(iv).

Hale filed a timely *Notice of Appeal* on December 23, 2011. (Appx. 177.)<sup>1</sup>

**II. STATEMENT OF THE ISSUES**

- A. Whether Hale's Fifth Amendment right to be present at all critical stages of his trial was violated when he was excluded without his consent from a substantial portion of voir dire.

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<sup>1</sup> The references to the record are: all matter found in the Separate Appendix will say "Appx." followed by the page number(s) at which the matter is found; "Vol. \_\_\_ at \_\_\_" refers to the transcript volume followed by the page(s) at which the matter is found; and "Doc. \_\_\_" refers to the document number on the Docket Sheet. Throughout this brief, Hale cites to the record using the docket number and pagination from the banner placed on the document by the CM/ECF system from his district court cases.

- B. Whether Hale's Sixth Amendment right to effective assistance of counsel at trial was violated.

### III. STATEMENT OF THE CASE

Matthew Hale was charged with: obstruction of justice on December 12, 2002 (Count 1); solicitation of the murder of U.S. District Court Judge Joan Lefkow from November 29-December 17, 2002 (Count 2); solicitation of the murder of Judge Lefkow on December 4, 2002 (Count 3); obstruction of justice from November 29-December 17, 2002 (Count 4); and obstruction of justice in April 2003 (Count 5).

On April 26, 2004, a jury convicted Hale on Counts 1, 2, 4 and 5, but acquitted him on Count 3. On November 10, 2004, the district court dismissed Count 5. Hale was sentenced to 480 months imprisonment, plus 3 years supervised release.

On May 30, 2006, the Seventh Circuit affirmed Hale's convictions and sentence in *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006). (Appx. 44-60.) On January 8, 2007, the U.S. Supreme Court denied his petition for a writ of certiorari. *Hale v. United States*, 549 U.S. 1158 (2007).

On January 7, 2008, Hale filed a § 2255 motion (Doc. # 1) and on July 22, 2010, the district court denied it and denied a certificate of appealability (Appx. 71). On October 27, 2011, the court denied Hale's motion for reconsideration (Doc. # 52) and again denied a certificate of appealability (Appx. 154).

This Court granted a certificate of appealability on March 6, 2012 as follows:

We find that Hale has made a substantial showing of the denial of a constitutional right as to whether his trial counsel provided effective assistance and whether Hale's due process right to be present at all critical stages was violated. In addition to any other alleged errors by counsel that Hale wishes to argue, the parties should specifically address counsel's performance with respect to jury selection.

Seventh Circuit Doc. # 10.

This appeal follows.

#### IV. STATEMENT OF THE FACTS

At jury selection, the district court determined that individual voir dire regarding venirepersons' exposure to publicity would be done in-chambers without Hale present. (Vol. 1 at 19.) Defense counsel and the court had the following discussion:

MR. DURKIN: ... Mr. Hale had asked whether I thought he should come here. I said I would report back. I said I thought it okay if he was not here.

THE COURT: Yes, tell him.

Appx. 184-185. Nothing more was discussed regarding Hale's acquiescence, waiver or consent to his absence. Counsel and the court failed to explain to Hale his constitutional right to be present and failed to obtain a waiver of this right from Hale. While the court and counsel privately conducted voir dire in-chambers, Hale remained in the courtroom, along with the remaining venirepersons.<sup>2</sup> (See Vol. 1 at 31-120; Appx. 184-185, Vol. 1 at 122-274; Vol. 2 at 1-59; Appx. 67-68, ¶ 23). Defense counsel failed to object and Hale never consented to his exclusion from this critical portion of his trial.

During jury selection white venireperson Mark Hoffman was questioned and it came out that he:

- (1) was involved in a homosexual relationship with an African-American man (Appx. 200);
- (2) had heard that Benjamin Smith, a member of Hale's church, had gone on a racist shooting

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<sup>2</sup> Out of the approximately 17,993 lines of voir dire, approximately 10,627 were done in Hale's presence and approximately 7,366 lines were done outside of his presence. Thus, Hale was absent for 41% of the jury selection process.

spree in 1999 and killed several people including Ricky Byrdsong, basketball coach at Northwestern University (Appx. 188-189);

- (3) had heard that, “Benjamin Smith said something like he was told to go do what he had done,” impliedly by Hale (Appx. 189-190);
- (4) was an Assistant Dean at Northwestern University where Byrdsong had coached (Appx. 191); and
- (5) was going to hear that Smith’s shooting spree had occurred in the West Rogers Park neighborhood where Hoffman now lived (Appx. 197-199).

Counsel subsequently permitted Hoffman – as well as five African-Americans (Appx. 203-206) – to be on the jury despite the fact that counsel knew it was likely that the following evidence would be presented at trial:

- (1) Hale was a well-known white supremacist who had strong animosity toward African-Americans and had expressed his strong racist beliefs as a speaker at numerous Ku Klux Klan meetings (Vol. 4 at 10-12, 180-185; Vol. 5 at 93; Vol. 6 at 221-23, 226; Vol. 7B at 74-75);
- (2) Hale commonly used racial slurs including the word “nigger” (*Hale*, 448 F.3d at 975) (Appx. 50);
- (3) Hale had supposedly stated that he had “dreams to hunt and kill Jews and African-Americans” (Appx. 210; Appx. 274-276);
- (4) Hale had supposedly praised one of his followers for killing minorities (Appx. 208-209; Vol. 4 at 197; Appx. 295-297, 302-303);
- (5) Hale supposedly wished that Smith had killed “more race traitors” (Appx. 251);

- (6) defense counsel would introduce into evidence and read extensively from the two bibles of Hale's Church (Def. Ex. 15 and 16) including justification of the use of violence and terrorism (Appx. 263-272) and including the following exchange between Hale's counsel and a witness:

Q. And then it says, "From the white man's point of view, the Jews, the niggers and the mud races are its eternal, natural enemies," correct?

A. Yes.

Q. "This is as basic and unalterable as the conflict between the pioneering mother and the rattle snake." Am I right?

A. That's what it says.

Q. And then it says, "Either/or, at this crucial stage of history, either the white race will survive or the Jews and their enslaved mud races, it will be one or the other, and this, too, is a grim unalterable fact of life whether we like it or not," correct?

A. That's what it says.

Q. Now, chapter 29 is a chapter that's entitled Who Needs Niggers, or Elimination of the Black Plague, am I right?

A. That's what it says.

Q. And then it says on page 175, the second page of that chapter under Deadly Enemies, "We of the Church of the Creator recognize the niggers as the foremost amongst our deadly enemies with the Jews taking top priority. We regard all the colored races as a grave menace to our further existence on this planet, whether they be black, yellow or brown." Am I right?

A. Yes, that's what it says.

Appx. 268-269; and

- (7) Hale was publicly hostile to interracial sexual relationships and had a strong animosity toward white people involved in such relationships, calling them "race traitors" and

supposedly would have them “exterminated” (Appx. 253-261).

The jury, with Hoffman as its foreperson (Appx. 311), convicted Hale.

The following evidence was presented at trial:

In May 2000, TE-TA-MA Foundation sued Hale’s Church for trademark infringement in U.S. District Judge Joan H. Lefkow’s court. (Vol. 4 at 51-53.) TE-TA-MA was represented by attorneys James Amend (Vol. 4 at 51), Kevin O’Shea and Paul Steadman (Vol. 4 at 75; Appx. 314) of the Kirkland & Ellis law firm.

In January 2002, Judge Lefkow granted summary judgment in Hale’s Church’s favor. (Appx. 213.) The Kirkland & Ellis lawyers appealed. (Appx. 221.) This upset Hale and he tried to discourage them from doing so (Appx. 242-248), calling them “scoundrels,” labeling Amend a “definite Jew,” and Steadman a “probable Jew” (Appx. 241, 244, 247). He had impugned the motives of the lawyers consistently since the filing of the lawsuit, calling it “malicious” and “frivolous.” (Appx. 244.) Hale urged his followers to call and harass the three lawyers throughout the litigation. (Appx. 238-241, 245.) At Hale’s request, members of his Church made harassing telephone calls and sent harassing emails to Amend and the other lawyers. They in turn asked Judge Lefkow to award attorneys’ fees, partially on this basis (Appx. 222-225); she declined to do so in March 2003 (Appx. 231).

The Seventh Circuit reversed Judge Lefkow’s summary judgment in Hale’s Church’s favor in July 2002, ordering Judge Lefkow to order the Church to cease using the name “Church of the Creator.” (Appx. 214, 249.) The Church and Hale then accused the lawyers of fraud in bringing the case and moved to disqualify them from continuing to represent TE-TA-MA. (Appx. 218-220.)

Lawyer Amend filed a motion seeking to hold the Church and Hale in contempt, alleging that

the Church had failed to comply with Judge Lefkow's order. (Appx. 215-217.)

On December 4, 2002, Hale sent (F.B.I. informant) Tony Evola an e-mail requesting that Evola obtain the home addresses of Judge Lefkow and attorneys Amend, Steadman and O'Shea, labeling both Amend and Steadman as "Jew" and Judge Lefkow as "probable Jew or married to Jew." (Appx. 314.)

On December 5, 2002, Evola unexpectedly appeared at Hale's house and the following dialogue occurred:

Evola: Well, I got your email about the Jew judge, ...

Hale: Right.

Evola: ... you wanting *his address and the other rats'* [*all his rats'*].<sup>3</sup> Ah ...

Hale: That information yes, for educational purposes and for whatever reason you wish it to be.

Evola: Are we gonna ... I'm workin' on it. I, I got a way of getting it. Ah, when we get it, we gonna exterminate the rat?

Hale: Well, whatever you wanna do ...

Evola: Jew rat?

Hale: ... basically, it's, you know? Ah, my position's always been that I, you know, *I'm gonna fight within the law* and but ah, that information's been pro-, provided. If you wish to, ah, do anything yourself, you can, you know?

Evola: Okay.

Hale: So that makes it clear.

Evola: Consider it done.

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<sup>3</sup> "[T]he other rats" was in the transcript the government provided to the jury but there is evidence that Evola actually said "all his rats." In either case, there should have been an apostrophe after the "s" in "rats" although this was omitted in the government's transcript.

Hale: Good.

Appx. 318-319 (emphasis added).

Evola then stated that he would get the address of the “Jew judge, *lawyer rat* ...” at which point Hale cut him off. (Appx. 320.) Hale then told Evola to send him the addresses of the judge and lawyers as soon as he obtained that “information” so that Hale could post it on the internet:

... you know, you can and *all that stuff* is, I mean yeah, as soon as you get *it*, I mean send *it* certainly. I’ll post *it* on the internet. We want our people to know and, and ah, *information about these people* and ...

Appx. 321 (emphasis added).

On December 9, 2002, Hale received an email from Evola indicating for the first time that he, Evola, had murderous designs toward a “*femala* rat.” (Appx. 324.)

On December 12, 2002, Hale wrote Judge Lefkow reporting the fraud of lawyer O’Shea, imploring her to hear the Church’s pending motion for judgment in its favor, referring to her as “Your Honor” and “thank[ing] [her] for [her] time and consideration.” (Appx. 325.)

On December 17, 2002, Evola again appeared at Hale’s house. Hale told Evola that he could not be a part of any plot to kill Judge Lefkow and that he could not “be a party to such a thing.” He told Evola that he had not ordered, instructed or encouraged Judge Lefkow’s murder and that “I know the law, brother, and I’m just not interested in breaking it.” When Evola told Hale that “she’s gotta go down, I guess,” Hale replied, “Well, *I don’t*.” Hale then told Evola that Evola’s plans were “too serious,” “incredible” (unbelievable), and that he, Hale, did not “want anything.” Hale denied having ordered Judge Lefkow’s murder. (Appx. 329.)

Hale was arrested on January 8, 2003 and charged with soliciting Judge Lefkow’s murder and with obstruction of justice by virtue of that alleged solicitation.

## V. SUMMARY OF THE ARGUMENTS

Hale was deprived of his Fifth Amendment right to be present at and participate in the entire jury selection process, a critical stage of his criminal trial, when he was excluded from a lengthy portion of individual voir dire dealing with the venirepersons' exposure to publicity. Because he neither consented to his exclusion and whatever alleged "waiver" by counsel of his right to be present was legally inadequate, his convictions must automatically be reversed since this constitutional error affected the framework in which the trial proceeded rather than was one that can be quantitatively assessed in light of the evidence of the case. In particular, Hale's absence meant that he did not hear venireperson Hoffman say that he thought Smith "said something like he was told to go do what he had done," presumably by Hale, nor that African-American venireperson Phillips had read and heard that "Matthew Hale had indicated that he wanted Smith to do the crimes that he did." (Appx. 195-196.)

Hale was also deprived of his Sixth Amendment right to effective assistance of counsel. Counsel's performance was objectively unreasonable when they failed to excuse any African-American jurors and failed to excuse Hoffman when they knew that Hale's white supremacist views, race hatred, and specific animosity for people involved in interracial relationships would come out at trial. Due to the background of these six jurors in conjunction with Hale's racist beliefs, no objectively reasonable counsel would believe that they would be more favorable to the defense than white jurors, nor expect that they would be likely to judge Hale strictly on evidence of guilt and thus be unbiased. Bias in fact existed and his convictions must be reversed to remedy this Fifth Amendment due process violation as well as because he has shown a "substantial risk" that he was prejudiced by this jury selection in violation of the Sixth Amendment.

Counsel's performance was also ineffective when they failed to object to Hale's exclusion from voir dire questioning. Voir dire was particularly important here because counsel knew that the government was going to present a plethora of evidence regarding the very emotionally-charged issues of Hale's racism and his reputed connection to the racially motivated Smith killings. It was extremely important for Hale to have been present for all juror interviews so that he could hear the venirepersons' responses and could then assist his attorneys in determining whether to excuse them.

Counsel also performed ineffectively when, due to a basic lack of understanding and advocacy of the facts of Hale's case supporting his innocence, they conceded a key element of the charges against him – that Judge Lefkow was the subject of the supposed solicitation – and failed to present the evidence in their possession undermining that element, thus rendering his trial an unreliable indicator of guilt. Counsel furthermore presented an entrapment defense that would have required the jury to find that Evola had solicited Hale to solicit him, a “labyrinthine conclusion” considering the evidence of the case. In addition, counsel caused the elicitation of hearsay evidence that Hale and his Church had solicited prior murders and linked Hale to terrorism by virtue of the books he espoused. Finally, counsel failed to prepare Hale to testify in his own defense due to their lack of preparation and ignorance of his factual claims and counsel concluded the trial by telling the jury that Hale deserved to be convicted, among other hostile remarks. Due to these unreasonable errors under acceptable standards of criminal defense representation, Hale's trial likewise was rendered an unreliable indicator of guilt in violation of his Sixth Amendment right and violative of his Fifth Amendment due process rights as well.

At a minimum, the court should have granted Hale an evidentiary hearing since the record does not “conclusively show” that his claims are groundless.

## VI. ARGUMENTS

### A. VIOLATION OF FIFTH AMENDMENT RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF TRIAL.

Hale's Fifth Amendment right to be present at all critical stages of his trial was violated when he was excluded from in-chambers individual voir dire;<sup>4</sup> any "consent" by his counsel to his absence was not attributable to him and was not adequate to waive his presence.

#### 1. Standard of review.

The Supreme Court has divided constitutional errors into trial and structural. Trial error is "error which *occurred during the presentation of the case to the jury*, and which *may therefore be quantitatively assessed in the context of other evidence presented* in order to determine whether its admission was harmless beyond a reasonable doubt." *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991) (emphasis added). Structural error is a "defect *affecting the framework within which the trial proceeds*, rather than simply an error in the trial process itself," and constitutes "defects in the constitution of the trial mechanism, which *defy analysis by 'harmless-error' standards*["]" *Fulminante*, 499 U.S. at 309-10 (emphasis added). *See United States v. Harbin*, 250 F.3d 532, 542 (7th Cir. 2001) (same). Thus, "violations of certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial." *Rose v. Clark*, 478 U.S. 570, 587 (1986) (Stevens, J. concurring).

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<sup>4</sup> This also violated F.R.Crim.P. Rule 43(a) which states, "[t]he defendant shall be present ... at every stage of the trial including the impaneling of the jury ..., except as otherwise provided by this rule." *See United States v. Camacho*, 955 F.2d 950, 953 (4th Cir. 1992) ("... Rule 43 has traditionally been understood to codify both a defendant's constitutional right and his common law right to presence;" citations omitted). Any Rule 43(a) violation is subsumed in Hale's Fifth Amendment right to be present.

The Supreme Court has found that absence from critical stages of a trial triggers automatic reversal if “the deprivation, by its very nature, cannot be harmless.” *Rushen v. Spain*, 464 U.S. 114, 119 (1983). Hale’s deprivation of his right to be present at voir dire resulting in the seating of biased jurors “by its very nature, cannot be harmless” since the selection of unbiased jurors is an integral part of the trial framework and has a continuing effect on the entire jury trial process. As this Court has stated,

[t]he error presented here is precisely the type of error that “**defies harmless error analysis.**” No one argues that the alternate who replaced Juror M was somehow biased, and **it is impossible to determine what impact, if any, the substitution had on the jury’s ultimate decision.** This would be true of many errors relating to peremptory challenges, because the existence of challenges for cause presumably removes anyone with obvious bias or potential for bias, and **we cannot assess** how the makeup of the jury may have impacted the decision making process.

...

... the **error calls into question the impartiality of the jury** because it **cripples the device designed to ensure an impartial jury by giving each party an opportunity to weed out the extremes of partiality.** ... The right to an impartial jury is the sort of right that **requires automatic reversal when denied.** ... Where the error is substantial enough to undermine the constitutional right, ..., automatic reversal is required.

*Harbin*, 250 F.3d at 545, 548 (emphasis added). “If respondent had established [the denial of his constitutional right to be present at every critical stage of his criminal trial], he would have sustained his burden of showing essential unfairness and would be entitled to the issuance of a writ of habeas corpus.” *Rushen*, 464 U.S. at 125 (Stevens, J., concurring).

As occurred in *Harbin*, Hale’s exclusion “defies harmless error analysis” because it is virtually impossible to determine what impact Hale’s absence had on the jury’s ultimate decision. Because Hale was denied his opportunity to “weed out the extremes of partiality” through participation in the voir dire process, his absence tainted the jury process and his right to ensure an

impartial jury was impaired to a degree sufficient to undermine his constitutional right to an impartial jury. *See United States v. Pittman*, 418 F.3d 704, 708 (7th Cir. 2005) (“[i]n *Harbin*, we recognized that some errors affect the framework in which the trial proceeds which render the criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence, and are therefore reversible error *per se*”).

If automatic reversal is not warranted, the standard of review is for harmless error, even though Hale’s counsel did not object to his absence. *See United States v. Rodriguez*, 67 F.3d 1312, 1316 (7th Cir.1995). “This being a constitutional error we must assess its harmlessness under the elevated standard of *Chapman*, 386 U.S. 18 (1967), which requires that before we dismiss the error as harmless, we must be able to ‘declare a belief that it was harmless beyond a reasonable doubt’ [citation omitted].” *United States v. Neff*, 10 F.3d 1321, 1326 (7th Cir. 1993). Thus, this Fifth Amendment violation “puts a heavy burden on the government” to prove beyond a reasonable doubt that this error was **not** harmful. *United States v. Watkins*, 983 F.2d 1413, 1422 (7th Cir. 1993).

## **2. Cause/actual innocence.**

“Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either ‘cause’ and actual ‘prejudice,’ ... or that he is ‘actually innocent’ ....” *Bousley v. United States*, 523 U.S. 614, 622 (1998) (internal citations omitted).

The “cause” for Hale’s failure to bring this issue in the district court was that counsel were ineffective in failing to raise it.

As for the district court’s finding this claim to be barred by Hale’s failure to raise it in his *pro se* direct appeal (Appx. 147-151), the court erred because there was cause. First, Hale did not raise

this issue on appeal because he did not have access to the voir dire transcripts and because his post-trial counsel had performed ineffectively by erroneously telling Hale that the transcripts were sealed and that he was not allowed to have them and thus use them. (Appx. 69-70, ¶¶ 33-34.) Second, the record on appeal did not show that Hale's absence was in fact involuntary. (Appx. 149.) Because his claim was supported by extrinsic evidence of his involuntary absence outside the trial record, Hale was foreclosed from bringing it on appeal since appeals courts are limited to the record of the lower court. If a claim of ineffective assistance of counsel is properly brought pursuant to a § 2255 motion because it is supported by evidence outside the trial record, so should an absence from voir dire claim be properly brought pursuant to a § 2255 motion when it too is supported by evidence outside the trial record.

Furthermore, Hale does not need to show "cause" in this matter because he has made a showing of actual innocence. To establish actual innocence, a defendant must show that "it is more likely than not that no reasonable juror would have convicted him." *Bousley*, 523 U.S. at 623. Hale has made this showing and, therefore, this issue may be adjudicated on the merits.

### 3. Fifth Amendment violation.

As the Supreme Court has stated:

... in affirming *voir dire as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present*, the Court wrote: "[W]here the indictment is for a felony, the trial commences at least from the time when the work of empanelling the jury begins." ... See *Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965) (*voir dire* "a necessary part of trial by jury"); ... Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury *free from ethnic, racial, or political prejudice, ..., or predisposition about the defendant's culpability, ...*

*Gomez v. United States*, 490 U.S. 858, 873 (1989) (most citations omitted; emphasis added). The Supreme Court has recognized that "the defense may be made easier if the accused is permitted to

be present at the examination of jurors ..., for it will be in his power, if present, to ***give advice or suggestions*** or even to ***supersede his lawyers altogether and conduct the trial himself.***” *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934) (emphasis added). An accused “***has a [constitutional] right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.***” *Faretta v. California*, 422 U.S. 806, 819, n.15 (1975). “Thus, a defendant is guaranteed the right to be present at any stage of a criminal proceeding that is critical to its outcome if the defendant’s presence would ***contribute to the fairness of the procedure.***” *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (emphasis added).

The Supreme Court has also stated that a defendant “is entitled to an impartial jury composed of persons not disqualified by statute, and his life or liberty may depend upon the aid which, ***by his personal presence***, he may give to counsel and to the court and triers, in the selection of jurors. The ***necessities of the defense may not be met by the presence of his counsel only.***” *Hopt v. Utah*, 110 U.S. 574, 578 (1884) (emphasis added).

... ***A defendant’s absence during the impaneling of the jury certainly frustrates the fairness of the trial.*** The absent defendant is ***denied the opportunity to give advice or suggestions to his lawyer*** concerning potential jurors. A defendant’s presence is also necessary so that he may ***effectively exercise his peremptory challenges***, a process that is ***essential to an impartial trial.***

*Camacho*, 955 F.2d at 953 (emphasis added).

Because an accused has a Fifth Amendment right to be present at trial, including the impaneling of the jury, Hale’s absence violated this right and vitiated the verdict and judgment:

... if [the defendant] be deprived of his life or liberty without being so present, such deprivation would be without due process of law required by the Constitution. For these reasons, we are of the opinion that it was error, ***which vitiated the verdict and judgment***, to permit the trial . . . to take place in the absence of the accused.

*Hopt*, 110 U.S. at 579. See also, *United States v. Alikpo*, 944 F.2d 206, 209 (5th Cir. 1991)

(“convening a criminal tribunal without the presence of the defendant treads precariously close to the concept of trial *in absentia* which our system has long disdained”).

#### **4. Prejudice.**

Hale does not need to show prejudice because this violation “affected the framework within which the trial proceed[ed]” and thus requires automatic reversal. Because voir dire is critical, it affects the outcome of the proceedings. It may in fact be more critical than any other stage of the proceedings since these are the people who decide a defendant’s fate. As the Supreme Court stated in *Snyder*, a defendant must be present to offer suggestions and/or fire his lawyers, if necessary, to stop the seating of inappropriate jurors. Notably, *Snyder* did not concern itself with whether any specific juror’s presence made the process critical but rather focused on whether the *voir dire process as a whole* was critical.

If, however, this Court finds that automatic reversal is not warranted, the government must show beyond a reasonable doubt that Hale’s absence was harmless. *Neff*, 10 F.3d at 1326. The government has not shown this. *See Alikpo*, 944 F.2d at 209 (the government did not prove the error was harmless even though the defendant was present at the exercise of the jury strikes, as the defendant could be of little assistance to counsel when he had neither heard the venire’s responses to questions nor observed their reactions to him and to the proceedings). Hale’s absence: (1) denied him the opportunity to ask questions of and provide input to his counsel in determining the qualifications of the jurors; (2) denied him the opportunity to comment or raise objections through counsel when the court, in-camera, struck certain jurors for cause; (3) his presence in the courtroom after the in-camera proceedings was insufficient to address these deficiencies because he lacked knowledge of what the jurors had said in-camera; and (4) precluded him from hearing what Hoffman

said that showed that he was biased and thus already predisposed to find Hale guilty. If he had been present to hear these statements, Hale would have insisted that Hoffman be removed for cause, or if necessary, excused with a peremptory challenge. (Appx. 68, ¶ 24.)

Because the record here does not “completely negative any reasonable possibility of prejudice arising from such error” (*United States v. Smith*, 31 F.3d 469, 473 (7th Cir. 1994)), the violation of Hale’s right to be present was not harmless and reversal is required.

**5. Hale did not consent to his absence or waive his right to be present at voir dire.**

The district court “rested its denial” of this claim on a finding that “his attorney, with Hale’s obvious acquiescence, waived Hale’s presence.” (Appx. 147.) However, as Hale stated in his *Declaration* (Appx. 67-68, ¶ 23), he did not consent and there is no consent on the record. Nor does a purported “waiver” by counsel impute to Hale. *Rodriguez*, 67 F.3d at 1316 (“[a] defendant may waive his right to be present [citation omitted] but a purported waiver by counsel is not adequate to effect a waiver”); *United States v. Gordon*, 829 F.2d 119, 122-24 (D.C. Cir. 1987) (the right of a defendant to be present at the impaneling of the jury could not be waived by a naked representation of defense counsel that the defendant waived his right).

The record does not support the district court’s conclusion that Hale waived his presence; rather, the only relevant part argues the other way when counsel told the court: “Mr. Hale had asked whether I thought he should come here. I said I would report back. I said I thought it okay if he was not here,” to which the court replied “*Yes, tell him.*” The context makes clear that the court was telling counsel to tell Hale that it was “okay” that he not be there, not that Hale had consented to his absence. Furthermore, this was said after individual voir dire had already begun in Hale’s absence and thus after reversible error had already occurred. In-chambers voir dire then continued at length

before the court took a break. Even after the break, counsel did not “report back” that Hale had waived his presence. In fact, counsel never explained to Hale his right to be present at these proceedings and never obtained Hale’s consent. (Appx. 67-68, ¶ 23.) “[T]here can be no effective waiver of a fundamental constitutional right unless there is an ‘intentional relinquishment or abandonment of a **known** right or privilege.’” *United States v. Teague*, 953 F.2d 1525, 1533 (11th Cir. 1992) (emphasis in original), quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

“Courts indulge every reasonable presumption against waiver of fundamental constitutional rights.” *Johnson v. Zerbst*, 304 U.S. at 464 (internal quotes and citation omitted). See *Walton v. Briley*, 361 F.3d 431, 433 (7th Cir. 2004) (same). “In the trial context, we have explained that the district court should indulge every reasonable inference against a finding of voluntary absence.” *United States v. Achbani*, 507 F.3d 598, 601 (7th Cir. 2007).

Ironically, the district court stated that “the record shows that when [Hale] disagreed with his attorney’s decisions, he made that known to the court,” “[s]uggesting that Hale in fact did agree with his attorney to waive his presence” (Appx. 136) and yet it was precisely because Hale thought that he had been excluded against his will from individual voir dire that he later demanded to address the court to express his concerns over the racial makeup of the jury. (Appx. 203-206.) Rather than indicating consent, this further supports Hale’s claim that his absence was non-consensual.

The court also erred when it stated that Hale had to affirmatively insist to his counsel that he be allowed to be present (Appx. 138) as such a requirement does not appear in the law. The court cited *Taylor v. United States*, 287 F.3d 658, 661-62 (7th Cir. 2002) and *United States v. Boyd*, 86 F.3d 719, 723-24 (7th Cir. 1996) but neither of these cases dealt with absence from voir dire.

Lastly, the court erred when it ruled that Hale’s personal waiver of his right to be present did

not have to be on the record:

First, Hale's argument in his reply brief (DE # 36 at 13-14), is that the real problem is that *the court didn't address him personally and put his waiver of his right to be present on the record*. This assertion can be quickly dispensed with. Hale's authority for the proposition that the court was required to do so is *United States v. Gordon*, 829 F.2d 119, 122-24 (D.C. Cir. 1987). *Gordon* is not consistent with the law of this circuit. *Boyd*, 86 F.3d at 723-24 (7th Cir. 1996).

Appx. 139 (emphasis added). *Boyd*, however, had nothing to do with absence from critical stages of trial; it dealt with counsel's exercise of peremptory challenges. Furthermore, this circuit, like other circuits, does require a knowing and voluntary waiver of the constitutional right to be present at critical stages of trial to be placed on the record. This Court has reaffirmed its position that:

While a defendant may waive his right to proper procedures or to be present during the proceeding, a purported waiver by counsel is not sufficient. Rather, *the court must secure from the defendant, on the record, a knowing and unequivocal waiver of his rights*. See *United States v. Rodriguez*, 67 F.3d 1312, 1316 (7th Cir. 1995); see also 28 U.S.C. § 753(b); *Rogers*, 422 U.S. at 39; *United States v. Patterson*, 23 F.3d 1239, 1254-55 (7th Cir. 1994); *United States v. Neff*, 10 F.3d 1321, 1323-25 (7th Cir. 1993).

*United States v. Tyler*, 151 F.3d 1034, 1998 WL 476766, \*3 (7th Cir. 1998) (unpublished) (emphasis added). See also, *Gordon*, 829 F.2d at 122-24 (D.C. Circuit; same); *Larson v. Tansy*, 911 F.2d 392, 396-97 (10th Cir. 1990) (same); and *Alikpo*, 944 F.2d at 209 (5th Circuit; same). Clearly, no such on-the-record waiver from Hale occurred here.

## **6. Conclusion.**

Since the deprivation of Hale's Fifth Amendment due process right to be present at all critical stages of his trial affected the framework in which the trial proceeded, it frustrated his right to a fair trial and undermines confidence in the verdict. Therefore, his convictions should be reversed.

## **B. VIOLATION OF SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL**

## **1. Standard of Review.**

“Whether trial counsel provided constitutionally inadequate assistance is a mixed question of law and fact that we review *de novo*.” *Koons v. United States*, 639 F.3d 348, 351 (7th Cir. 2011). “To prevail on an ineffective-assistance of counsel claim under *Strickland*, a petitioner must demonstrate that his counsel’s assistance was objectively unreasonable and resulted in a substantial risk of prejudice.” *Brown v. Finnan*, 598 F.3d 416, 419 (7th Cir. 2010), citing *Strickland v. Washington*, 466 U.S. 668 (1984). “Both components of the inquiry are mixed questions of law and fact subject to independent review by this court.” *Precin v. United States*, 23 F.3d 1215, 1218 (7th Cir. 1994).

## **2. Discussion.**

### **a. Counsel’s performance regarding Hale’s absence from voir dire was objectively unreasonable and prejudicial.**

Counsel’s performance was deficient when they failed to consult Hale and then failed to object to his absence. The court erred when it concluded that Hale failed to show prejudice by his absence (Appx. 140-141) because the presence of Hoffman “resulted in a *substantial risk* of prejudice” by the seating of a juror who was biased due to his background, the forthcoming evidence of Hale’s beliefs, and exposure to publicity. The presence of this biased juror undermines confidence in the verdict. *See Strickland*, 466 U.S. at 694.

### **b. Counsel’s performance during jury selection was objectively unreasonable and prejudicial.**

Counsel’s choice to leave 5 African-Americans on the jury was objectively unreasonable where they knew that Hale’s white supremacist beliefs were going to be presented and would surely inflame African-American jurors against him since he had repeatedly attacked and insulted them by

attacking and insulting their race. Counsel struck numerous white jurors but refused to strike any African-Americans, despite Hale's views and history. It was unreasonable to expect that African-American jurors would be anything but antagonistic to racial-slur-slinging white supremacist Hale. The striking of these venirepersons would not have been discrimination based on their *race*, but rather, excusing them would have been based on Hale's racist views and utterances against African-Americans. In other words, Hale had a proper challenge to the African American jurors for cause. The district court did not address this in the denial of Hale's § 2255. (Appx. 131-132.) Counsel furthermore failed to ask the African-American venirepersons any questions to probe their natural and understandable bias even though there was obviously "a substantial risk" that they would seek to punish Hale for his views and statements rather than base the verdict strictly on evidence of guilt.

The district court erred when it found that Hale's counsel performed objectively reasonably when they failed to challenge and/or excuse Hoffman. (Appx. 133-135.) It was objectively unreasonable based on Hoffman's personal background in conjunction with Hale's beliefs. First, counsel knew that Hale's white supremacist beliefs were going to be presented to the jury and a juror involved in an interracial sexual relationship with an African-American man is likely to judge a person publicly hostile to that race and to such relationships more harshly than someone who is not. Furthermore, and more importantly, counsel knew that testimony was going to be elicited that Hale espoused the extermination, once his church came to power, of people involved in interracial relationships. (Appx. 253.) It was objectively unreasonable to leave a person on the jury who might thus feel a personal stake in Hale's conviction. Second, a juror who had heard that "Smith said something like he was told to go do what he had done," and believed that person to be Hale, would be predisposed to believe that Hale solicited Judge Lefkow's murder. (Nor did counsel ask Hoffman

where he had heard this and what he took it to mean.) Third, a juror who works at the same place as one of Smith's murdered victims would be expected to have to defend any verdict of not guilty to his colleagues and students, thus providing incentive to find Hale guilty in order to avoid any such controversy. Fourth, a juror who lives in the same neighborhood as several of Smith's victims would likewise be expected to have to defend a not guilty verdict to neighbors, thus providing an additional incentive to find Hale guilty.<sup>5</sup>

Hale's counsel should have probed into Hoffman's bias rather than simply taking at face value his "belief" that he could be fair and impartial. (Appx. 191-192, 200-201.) Bias can be present even when a juror believes himself to be fair and impartial and says so as well as when a juror *does not* believe himself to be fair and impartial but says that he is in order to secure a seat on the jury of a man he has reason to be prejudiced against because of his own background. It was extremely unlikely that Hoffman could truly have judged Hale exclusively on the evidence of the case and could have ignored Hale's strong, vociferous and well-documented hostility against African-Americans and those involved in interracial relationships in light of his own interracial relationship, what he had heard about Smith, and the potential displeasure of his work colleagues and neighbors were he to find Hale not guilty. The defense should have, at the very least, exercised a peremptory challenge on Hoffman. Instead, counsel failed to ask Hoffman a single question.

The failure to challenge biased jurors can be considered constitutionally deficient performance. *Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006). The right to a trial free of biased jurors is of constitutional magnitude. See *Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("[d]ue process

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<sup>5</sup> The district court discounted this last fact because it found that Hoffman did not move to this neighborhood until 2002, well after Smith's shooting spree. (Appx. 133.) It missed the point that Hoffman would have to return to this neighborhood and face his neighbors *after* the trial in 2004.

means a jury capable and willing to decide the case solely on the evidence before it”). “[T]he seating of any juror who should have been dismissed for cause . . . require[s] reversal.” *United States v. Blitch*, 622 F.3d 658, 665 (7th Cir. 2009), *quoting United States v. Martinez-Salazar*, 528 U.S. 304, 316 (2000). “Among these basic fair trial rights that can never be treated as harmless is a defendant’s right to an impartial adjudicator . . .”. *Gomez*, 490 U.S. at 876. Counsel’s failure to attempt to remove from the jury a person who has been established on voir dire to be biased constitutes prejudice under *Strickland*. *Hale v. Gibson*, 227 F.3d 1298, 1319 (10th Cir. 2000). Hoffman’s personal background certainly undermines confidence that he could have been an unbiased juror and, thus, undermines confidence in the verdict (*see Strickland*, 466 U.S. at 694), especially in light of the fact that Hoffman was made jury foreman.

**c. Counsel’s performance in failing to understand, advocate and present evidence of Hale’s factual innocence to the jury was objectively unreasonable and prejudicial.**

**1. Counsel’s failure to understand and advocate Hale’s factual claims of innocence.**

The jury convicted Hale of having solicited Evola to murder Judge Lefkow and obstruction of justice by virtue of that alleged solicitation. However, it rendered these verdicts unaware that ***neither Hale nor Evola were talking about Judge Lefkow in the first place and thus there was no federal target and hence no federal case.*** As argued below, Hale’s counsel cannot have rendered effective assistance when, due to a misunderstanding of fact, they failed to realize that the key premise of the government’s case (that the alleged solicitation concerned Judge Lefkow) was open to challenge and as a consequence conceded it.

The failure of counsel here was basic and devastating: they failed to realize that Evola’s use of the word “it” – as in “when we get it, we gonna exterminate the rat? Jew rat?” – referred to the

“information” Hale wanted, the addresses of the *four* people, not Judge Lefkow’s address alone. *See supra* at 6-8. As a result, counsel never understood Hale’s insistence that the “Jew rat” Evola queried about exterminating was actually lawyer Amend and not Judge Lefkow, never understood that Evola’s December 9, 2002 “femala rat” e-mail then announced to Hale for the first time that Evola had plans against Judge Lefkow, and, thus, never understood that Hale’s statements on December 17, 2002 were a genuine refusal to join Evola’s new plans to kill Judge Lefkow rather than “plausible deniability” as the government claimed. “Where defense counsel is so ill-prepared that he fails to understand his client’s factual claims ..., we have held that counsel fails to provide service within the range of competency expected of members of the criminal defense bar.” *Young v. Zant*, 677 F.2d 792, 798 (11th Cir. 1982). Rather, counsel conceded the government’s claim that Judge Lefkow was the “Jew rat” Evola was referring to on December 5, 2002 and thus the subject of an alleged murder solicitation. Furthermore, counsel presented an entrapment defense which, by definition, admitted that Hale had solicited Judge Lefkow’s murder. In so doing, counsel failed to subject the prosecution to a meaningful adversarial hearing on an essential element of both charges and accordingly relieved it of its burden of proof. In essence, as a result of counsel’s error of fact, counsel admitted a federal case that did not actually exist.

Counsel simply did not appreciate that they could defend this case on the grounds that Judge Lefkow was not even the subject of any *conceivable* murder solicitation, and yet, “[a]t the least, defense counsel in a criminal case should understand the elements of the offenses with which his client is charged and should display some appreciation of the recognized defenses thereto.” *Scarpa v. Dubois*, 38 F.3d 1, 10 (1st Cir. 1994). It is plain from their cross examination of Evola that counsel did not realize that Evola’s saying “you wanting his address and the other rats” – and the

ensuing “it” (information) from which he queried about exterminating – *meant that he was referring to the four addresses that Hale was wanting, not just Judge Lefkow’s:*

Q: And was this right after you said you were wanting his address. Do you see that on line 1?<sup>6</sup>

A: Yes.

Q: Did Mr. Hale stop you and say, excuse me, I want – I want you to kill a woman judge, not a man?

A: No, he did not.

Q: But it’s your testimony that after you told him that you were going to – that you wanted his address and that the rat you were going to kill was a him, correct?

Appx. 292.

It is thus evident that instead of four addresses from which Evola queried about exterminating an unknown “rat,” counsel thought that only one address, Judge Lefkow’s, was at issue and that this failure to understand the facts of Hale’s case warped their entire representation of him. Throughout the trial, counsel presumed that the “it” was composed of only Judge Lefkow’s address and thus counsel were totally oblivious to Hale’s factual claims of innocence, including the fact that Judge Lefkow was not the “Jew rat” and thus that there was no federal case at all. In other words, counsel failed to realize that Evola did not even *ask* whether they were going to exterminate Judge Lefkow. For its part, the government too was under the mistaken belief that only Judge Lefkow’s address was at issue as illustrated in its opening statement:

You will hear the taped conversation from December 5th; and in that conversation, the defendant and Evola talk about the e-mail, that Evola asks the defendant what is going to happen after we get the judge’s address. And he asks, “when we get it,”

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<sup>6</sup> In reality, Hale was “wanting his address and the other rats” *addresses*.

referring to the address, “are we going to exterminate the rat?”

Appx. 211-212.

Evola did **not** ask what was going to happen after they got the Judge’s address and the “it” did **not** refer to “the address” but rather referred to the “information” Hale wanted: the four addresses. While the government was entitled to present its own view of the evidence, that certainly does not excuse counsel’s failure to understand and advocate the facts of **Hale’s** case that contradicted that view and that would have supported his claim of innocence. The entire trial was thus based on the false premise that Judge Lefkow was the “Jew rat” and the subject of an alleged solicitation and obstruction that never happened. (*See, e.g.*, Appx. 293.) “[O]ur appreciation of the **consequences** of counsel’s actions may well help us to evaluate the **reasonableness** of those actions.” *United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1014 (7th Cir. 1987) (emphasis added). This failure to understand the facts of Hale’s case was plainly objectively unreasonable since it had nothing to do with a reasoned professional judgment. Because the failure here “was a mistake, and not a calculated strategic decision,” counsel’s “performance fell below the objective standard of reasonableness required by *Strickland*.” *Harris v. Cotton*, 365 F.3d 552, 556 (7th Cir. 2004). Deficiency is present where counsel’s failure “was not based on ‘strategy,’ but on counsel’s mistaken beliefs ...” *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Nor does a thorough cross-examination pursuant to defense counsel’s own theory of the case (but based on a confusion of the facts) preclude a finding of ineffectiveness of counsel. *See White v. Godinez*, 301 F.3d 796, 802 (7th Cir. 2002). “[C]ounsel’s function ... is to make the adversarial testing process work in the particular case.” *Strickland*, 466 U.S. at 690. That function was unfulfilled here since Hale’s counsel failed to realize that the very crux of the government’s case – that Evola was querying about exterminating

Judge Lefkow – was indeed open to meaningful adversarial testing. It is a truism that unless counsel is aware that the core proposition of a prosecution’s case is subject to meaningful adversarial testing, counsel will be unable to render effective assistance by virtue of testing that proposition. *See Scarpa*, 38 F.3d at 10.

The district court believed that it was “irrelevant” whether counsel indeed failed to realize that Evola’s “it” was composed of several addresses instead of only Judge Lefkow’s (Appx. 160-161); however, it cannot be objectively reasonable for a lawyer to fail to understand the facts of his client’s case, especially facts that support the client’s innocence. Such a failure does go to the objective reasonableness of counsel’s performance. If counsel did not realize that Evola’s “it” was composed of four addresses (the “information” Hale wanted), they performed objectively unreasonably because that was a fact of Hale’s case and a reasonable lawyer would understand those facts. On the other hand, if counsel *did* realize it but forsook that knowledge, they were objectively unreasonable for extinguishing reasonable doubt as to an essential element of the charges: that Judge Lefkow was the subject of a supposed solicitation. Either way, Hale is entitled to prevail. Contrary to the view of the district court, counsel’s task, furthermore, is not to acquiesce in whatever view of the evidence the government posits but rather includes “the overarching duty to advocate the defendant’s cause ...” *Strickland*, 466 U.S. at 688. Hale’s cause here was that Evola was not talking about Judge Lefkow and thus there was no federal case against him.<sup>7</sup>

Had Hale’s case of actual innocence been understood and then presented and argued to the jury, there is a better than negligible chance that he would have been acquitted. *See United States*

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<sup>7</sup> As for the district court’s recognition that counsel realized that the *emails* were talking about four addresses (Appx. 86-87, 160), that does not mean that counsel realized that Evola’s “it” was composed of four addresses. The trial transcripts show that they did not.

*ex rel. Hampton v. Leibach*, 347 F.3d 219, 246 (7th Cir. 2003) (prejudice for purposes of an ineffective assistance of counsel claim has been established “so long as the chances of acquittal are better than negligible”). The facts of the case as they came out at trial (*see* “Statement of the Facts,” *supra* at 6-8) – even without the evidence of his innocence (listed below) that was withheld from the jury by his counsel – decisively show that he had a much greater complaint with the TE-TA-MA lawyers than with Judge Lefkow who had ***ruled in his Church’s favor*** before being reversed by this Court. Presenting the case that Judge Lefkow was not even the subject of any ***conceivable*** murder solicitation would have given the jury reasonable doubt sufficient to acquit.

## **2. Counsel’s failure to present evidence of Hale’s innocence.**

At trial, counsel had in their possession but failed to present the following evidence which would have supported Hale’s innocence:

- a. Hale knew that Evola was an F.B.I. informant and it was because of that knowledge that he told Evola that he could do what he wanted, knowing he would not do anything. (*See* Doc. # 8-3 at 15, ¶ 32; at 31, ¶ 16; at 38, ¶ 16; Doc. # 52-1 generally, ¶ 25 specifically.)
- b. Hale had insisted to defense counsel that “the rat, Jew rat” whom Evola was querying about exterminating on December 5, 2002 was lawyer Amend as far as both Evola and Hale were concerned. (Appx. 61-66.)
- c. Hale had referred to lawyer Amend, not Judge Lefkow, as a “Jew rat” to lawyers representing him and his Church in civil matters. (Doc. # 8-3 at 5, 35.)
- d. “Jew rat” was Hale’s personal nickname for lawyer Amend. (Appx. 64, ¶ 12.)
- e. Evola had said that lawyer Amend “looks like a Jewish rat, all right” during a prior conversation. (Appx. 64, ¶ 12.)
- f. Evola himself referred to a “lawyer rat” during the December 5, 2002 conversation showing that “the rat, Jew rat” was in fact a *lawyer*, not Judge Lefkow. (Appx. 320.)
- g. The testimony of attorney Glenn Greenwald, John Schlismann, attorney Todd Reardon and Hale would have confirmed that Hale had previously used the term “Jew rat” as a nickname for lawyer Amend. (Appx. 61-66; Doc. # 8-3 at 5, 35.)

- h. Hale and Schlismann would also have testified that Evola, himself, had referred to lawyer Amend as a “Jew rat.” (Appx. 64, ¶ 12.)
- i. Hale did not think that Judge Lefkow was Jewish. (Doc. # 8-3 at 37, ¶ 11; Vol. 5 at 20, 112.)
- j. Hale had praised Judge Lefkow and was hoping for a favorable outcome for the motions that his Church had before her. (Doc. # 8-3 at 33-35.)
- k. Numerous witnesses would have testified to and corroborated these facts and other exculpatory evidence. (*See, e.g.*, Doc. # 18-2 at 22-24; Doc. # 8-3 at 4-40.) (***Counsel called no witnesses in Hale’s defense.***) In sum:
  - 1. Hale was committed to legal and peaceful change and condemned the illegal and violent acts of others, including that of Ben Smith. (Doc. # 8-3 at 4, 17, 23, 27, 29-30, 36, 67, 70.)
  - 2. Hale routinely sought the addresses of people, including judges and lawyers, for non-violent purposes. (Doc. # 8-3 at 13, 23, 31, 38, 41-43, 50-54, 56-63.)
  - 3. Hale routinely used the word “war” and similar terms to describe his non-violent public activism and that of his Church, thus undermining the government’s claim that his November 29, 2002 email sent to numerous people had criminal intent. (Doc. # 8-3 at 12-13, 19, 23-24, 27, 30-31, 37, 40, 45, 48, 55, 66-67, 71-72.)

All of this evidence would have undermined the government’s claim that Judge Lefkow was the “Jew rat” or that Hale was soliciting her murder. Certainly the jury needed to know that Judge Lefkow was not the subject of a murder solicitation and that Hale denied that the “Jew rat” whose murder he supposedly solicited was Judge Lefkow in the first place. Counsel also totally misled the jury as to the actual significance of the December 9, 2002 “femala rat” e-mail (Appx. 293b-293e; Appx. 301) – the e-mail was an announcement of Evola’s ***new*** plans against Judge Lefkow – and, thus, not only did Hale ***not*** solicit Judge Lefkow’s murder on December 5, 2002, but counsel failed to realize and argue that Hale had actually ***refused*** to join Evola’s plans against her on December 17, 2002. Instead, counsel disparaged Hale’s refusal as “silliness.” (Vol. 4 at 32.) *See Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001) (counsel has a duty to introduce into evidence

information that demonstrates factual innocence or that raises sufficient doubt on that question so as to undermine confidence in guilt). There can be no doubt that his jury would have wanted to know that Hale thought he was turning down Evola's *new* plans against a "femala rat," Judge Lefkow, on December 17, 2002.

The underlying purpose of the Constitution's guarantee of effective assistance of counsel is *truth* (*United States v. Cronin*, 466 U.S. 648, 655 (1984)), and yet that purpose was frustrated here since counsel withheld evidence from the jury that established the truth of Hale's innocence. "Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial." *Estes v. Texas*, 381 U.S. 532, 540 (1965). Thus, Hale's own counsel denied him a fair trial. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence ..." (*Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986)), but that purpose was frustrated here since numerous facts demonstrating Hale's innocence were not presented at his trial. Furthermore, the district court should have at least observed and evaluated Hale's witnesses and their testimony at a § 2255 evidentiary hearing rather than summarily discounting them, especially his attorney witnesses who were members of the state and federal bars.

Both the solicitation and obstruction statutes required that federal Judge Lefkow, not a private lawyer, be the subject of the alleged solicitation and obstruction. (Appx. 308-309.) She was not. And, rather than being irrelevant as the district court found, the fact that Hale had told counsel prior to trial that Judge Lefkow was not the "Jew rat" is *critical* to a proper assessment of whether counsel performed reasonably. "The reasonableness of a trial counsel's acts ... depends critically upon what information the client communicated to counsel." *Chandler v. United States*, 218 F.3d 1305, 1324 (11th Cir. 2000) (*en banc*). To not challenge the central premise of the government's

case, especially considering the contrary array of evidence in counsel's possession, was objectively unreasonable. Had counsel done so, Hale plainly would have had "a reasonable shot at acquittal" and thus has also shown prejudice. *Gibbs v. Vannata*, 329 F.3d 582, 584 (7th Cir. 2003). Since substantial evidence of innocence was withheld from the jury, confidence in the outcome is undermined thus meeting the *Strickland* test for prejudice. *Strickland*, 466 U.S. at 694.

By not contesting – and in fact ***agreeing*** – with the government's claim that Judge Lefkow was the subject of a supposed murder solicitation, counsel relieved the government of its burden to prove this essential element of both charges. "Counsel has a duty, at a minimum, to hold the [government] 'to its heavy burden to prove guilt beyond a reasonable doubt.'" *Fisher v. Gibson*, 282 F.3d 1283, 1306 (10th Cir. 2002), *quoting Cronin*, 466 U.S. at 657, n.19. Hale's claim meets the benchmark test for judging ineffectiveness claims. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. "When counsel has unwittingly relieved the government of its burden of proof, particularly when the evidence of record does not satisfy that burden, it is fair to say counsel has 'so undermined the proper functioning of the adversarial process that [it] cannot be relied on as having produced a just result.'" *United States v. Glover*, 97 F.3d 1345, 1349 (10th Cir. 1996), *quoting Strickland*. Sixth Amendment rights "are satisfied as long as counsel's conduct at trial is competent, ***and not so deficient as to render the trial meaningless or unreliable.***" *Winters v. Miller*, 274 F.3d 1161, 1166 (7th Cir. 2001) (emphasis added).

In sum, since counsel did not realize that Evola's "it" was composed of four addresses, counsel in turn conceded the very crux of the government's case (that Judge Lefkow was the "Jew

rat”), deprived the jury of ample evidence and argument that she was not, and caused Hale’s statements on December 17, 2002 to be cast as an attempt to “plausibly deny” his alleged crime rather than as the words of innocence that they actually were. Hale’s trial was thus indeed rendered meaningless and unreliable as a just and factual indicator of guilt in violation of his Sixth Amendment right and he should therefore be granted a new trial.

**3. Counsel’s failure to challenge the accuracy of the government’s December 5, 2002 transcript and recording through impeachment and professional analysis.**

Counsel failed to object to F.B.I. Agent Dustin Deterding’s version of the transcript that was used at trial. ( Vol. 4 at 165-167.) Counsel also failed to have the recording professionally analyzed even though the government’s original transcript corroborated that the “rat,” “Jew rat” whom Evola proposed “exterminating” was an attorney and not Judge Lefkow. (Appx. 62-65; Case No. 03CR011, Doc. # 219). As indicated earlier, the exchange actually went as follows:

Evola: Well, I got your email about the Jew judge, ...

Hale: Right.

Evola: ... you wanting *his address and all his rats*’. Ah ...

In other words, Judge Lefkow was not one of the “rats” from which Evola queried about exterminating. Counsel failed to impeach Deterding by demonstrating that the original government transcript corroborated that Evola had been talking about an attorney and not Judge Lefkow.

**d. The district court erred in its understanding of Hale’s argument and the law of ineffective assistance.**

The district court erred in its understanding of the case as follows:

1. That Hale’s argument for ineffective assistance was based on the idea that counsel should have admitted that Hale solicited James Amend’s murder or that any such admission was ever

in the offing. (Appx. 77-82, 84-85, 89, 92-93, 102.) This error greatly impacted the court's decision. (See also, Doc. # 52 at 9-12; Doc. # 64 at 3-4, 7-9.) Hale never solicited anyone's murder and thus the court's misapprehension that his argument was based on the idea that counsel should have admitted that he did in effect skewed its entire reasoning. Nor did Hale ever have a "plan" for the murder of anybody. (Appx. 83-85.) The court's opinion was therefore based on an argument that Hale did not make.

2. That Hale needed to "refute" the government's incorrect claim that Judge Lefkow was the "Jew rat" (see, e.g., Appx. 90, n.17); rather, Hale only needed to demonstrate **doubt** as to the matter.<sup>8</sup> "All [the defendant] needed to do was establish a reasonable doubt, and having [exculpatory] witnesses would have covered a lot of ground toward that goal." *Washington v. Smith*, 219 F.3d 620, 635 (7th Cir. 2000). Contrary to the court's opinion, Hale did not have to prove his innocence in order to demonstrate his counsel's ineffectiveness (see Appx. 84-85, 88-89, 97 and especially 90, n. 17); a criminal defendant is neither required to prove his innocence at trial nor in an ineffective assistance of counsel claim.

3. That contesting the notion that Judge Lefkow was the "Jew rat" would have meant conceding that Hale solicited somebody else's murder. This is not so for multiple reasons. First, attacking one element of a charge does not somehow **concede** a different element; it is the government's burden to prove **all** elements of a charge beyond a reasonable doubt. Second, the jury did not hear the evidence that Hale knew that Evola was an F.B.I. informant, thus negating any intent or solicitation that Evola murder **anyone**. Third, Hale plainly said that he was going to fight within

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<sup>8</sup> The evidence withheld from the jury that "Jew rat" was Hale's nickname for lawyer Amend is obviously highly significant since Evola queried about exterminating a "Jew rat," not a judge, on December 5, 2002.

the law, this also supporting a lack of intent and solicitation. Fourth, the evidence showed that Hale wanted the four addresses to post on the internet. Fifth, the fact that *four* addresses were being talked about in itself reduces the likelihood that he was soliciting anyone's murder. Thus, no concession of any solicitation would have been necessary; the central premise of the government's case – that Judge Lefkow was the “Jew rat” – could have been attacked without any concession to the other elements of the charges.

4. That whether counsel's concession that Judge Lefkow was the “Jew rat” was reasonable is determined by whether that is a reasonable view of the evidence that *was* presented at trial. The district court stated, “[i]t should go without saying that the only way to determine whether an attorney's choices are objectively reasonable is to interpret those choices in light of the evidence” (Appx. 171) but the problem is that the court only considered the evidence that was presented at trial and hence repeatedly referred to Judge Lefkow being the “Jew rat” as a “reasonable view” of the evidence, what a reasonable *jury could* find, and whether the government's case – absent of course the evidence of Hale's own case for innocence – was “plausible” (*see* Appx. 81, 84-85, 85 n.8, 86, 93, 97, 141 n.41). A reasonable or plausible view of the evidence that *was* presented at trial is irrelevant to a claim of deficiency on the basis that counsel withheld evidence of innocence. The fact that a reasonable *jury* could have found that Judge Lefkow was the “Jew rat” does not somehow absolve *counsel* from presenting evidence and argument that she was not because counsel's performance is not to be judged on the basis of what evidence the jury *heard* but rather on the basis of what evidence of innocence counsel *withheld*. The central theme of the district court's opinion is that, since a reasonable *jury* could have found that Judge Lefkow was the “Jew rat” based on the government's evidence, counsel acted objectively reasonably by conceding that she was. This was

erroneous.

- e. **Counsel introduced into evidence and read extensively from Hale's Church's two bibles even though they contained inflammatory racial passages and justification of violence and terrorism.**

Counsel introduced into evidence and then read extensively from these two books (Def. Ex. 15 and 16) despite the fact that the passages said that “Jews,” “niggers,” and “mud races” were “natural enemies” and called for the “Elimination of the Black Plague,” and despite *The White Man's Bible's* seeming justification of violence and terrorism. (See Appx. 263-272.) It was **defense counsel** who brought up the terrorism chapter (Appx. 269), and then, not surprisingly, both prosecutors cited it in closing argument and relied heavily on the book in arguing to the jury that Hale was predisposed and had acted and intended in conformance with its teachings when he supposedly solicited Judge Lefkow's murder. (See Appx. 297-299, 303-306.) Further, counsel introduced into evidence and read the above passages from the two books even though five of the jury members were African-American and one was Hispanic. Thus, not only did counsel admit into evidence highly inflammatory material, but they also opened the door for the prosecutors to use the terrorism chapter as a basis for the jury to find Hale guilty.

Contrary to the view of the district court (Appx. 122-124), the books had no impeachment value as to witness Jon Fox since he did not write them and the beliefs contained in books do not “impeach” those who subscribe to them. Simply put, whether or not Fox believed in the contents of *Nature's Eternal Religion* or *The White Man's Bible* did not make him a liar. On the other hand, since Hale was the leader of the Church that propounded the extremist beliefs contained in the books – and since he was the one on trial – counsel should have foreseen that the government could and would use the contents of the books against **him**. The books were not what discounted Fox's

testimony; what discounted it was, among other things, that Fox admitted to suffer from mental illness<sup>9</sup> (Vol. 5 at 245-247; Vol. 6 at 16-24), admitted that he lies when he is angry ( Vol. 6 at 70), admitted to being an “enemy” of Hale (Vol. 6 at 65), and was accused of battery upon a police officer and screaming and cursing at a school bus full of children (Vol. 6 at 26, 36).

**f. Since the district court found it unlikely that any reasonable jury could have found Hale entrapped, the entrapment defense presented by counsel was objectively unreasonable.**

Shortly after Hale’s trial in 2004, the district court stated the following regarding counsel’s claim that Hale was entrapped:

To reason that the evidence would allow a jury to conclude that Hale solicited Evola, but only because Evola induced Hale to solicit him, presents *the logical equivalent of a dog chasing its own tail. It seems unlikely that any reasonable jury would ever arrive at such a labyrinthine conclusion.*

Appx. 19-20, n.18 (emphasis added).

Thus, according to the court shortly after Hale’s trial had concluded, it was unlikely that *any* reasonable jury would ever have arrived at the conclusion that he was entrapped. The court further stated, “the court thinks now that it is a very close question whether the entrapment instruction was even warranted.” (Appx. 18.) Now, however, in denying Hale’s § 2255 motion alleging ineffective assistance of counsel, the court found that the entrapment defense presented by his counsel was not objectively unreasonable: “the court has explained extensively why it wasn’t objectively unreasonable to use an entrapment defense ...” (Appx. 167.)

The court cannot have it both ways; it cannot on the one hand be unlikely that *any* reasonable jury would ever have found Hale entrapped and on the other hand be objectively reasonable for his

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<sup>9</sup> Fox subsequently committed suicide in November 2005.

counsel to have pursued that defense. Furthermore, it cannot be objectively reasonable for counsel to have pursued a defense that would require a jury to arrive at a “labyrinthine conclusion” or “the logical equivalent of a dog chasing its own tail.” In a sense, the district court already ruled in 2004 that counsel’s presentation of an entrapment defense was objectively unreasonable because if it is unlikely that *any* reasonable jury would accept such a defense, it can be little else.

In any case and contrary to the opinion of the district court (Appx. 173), Hale did not have to show that an entrapment defense was per se objectively unreasonable, but rather only that it was objectively unreasonable to fail to understand the facts of Hale’s case and to withhold evidence (and argument) that Judge Lefkow was not the “Jew rat” on December 5, 2002 and thus the subject of any conceivable murder solicitation. In other words, it was not Hale’s burden to disprove the reasonableness of an entrapment defense; instead it was merely his burden to show that withholding evidence (and argument) of his innocence – due to ignorance that four addresses were at issue – was itself objectively unreasonable.

**g. Counsel failed to familiarize themselves with evidence in their possession.**

Counsel failed to adequately prepare for trial by failing to carefully read and then failing to object to the admission of the Seventh Circuit opinion reversing Judge Lefkow’s ruling in favor of Hale’s Church in the trademark case. (Appx. 360.) Apparently unbeknownst to counsel, this opinion contained a statement saying:

Note the change from ‘Church of the Creator, Inc.’ to ‘World Church of the Creator,’ an unincorporated association. This is apparently part of a *judgment-proofing strategy* after a court held in 1994 that Klassen’s organization must pay damages *for orchestrating a murder*.

Appx. 232-237 (emphasis added.) This wording allowed the jury to infer that the Church and its

leadership had a habit, plan or practice of soliciting murder, an extremely prejudicial proposition considering Hale's charges. Furthermore, this portion of the opinion was highlighted in the jury's copy without objection by counsel. (Appx. 363.) Counsel consequently failed to object to the admission of the opinion into evidence (Appx. 227-229), leaving only for plain error review on appeal.

Counsel also failed to object to the "judgment-proofing" line of questioning (Appx. 232) that led to testimony that "Church of the Creator," which the government proceeded to characterize as Hale's organization (Appx. 233), "sponsored" a murder (Appx. 237). Counsel then failed to ask the court for an instruction admonishing the jury that it could not use this "sponsoring" of murder in 1994 as evidence against Hale in the present case, again leaving review only for plain error.

Hale's allegation concerning the admission of the trademark case opinion into evidence had nothing to do with whether counsel should have objected to its *use* as evidence as the district court erroneously opined (Appx. 122) but rather whether counsel performed objectively reasonably when they had failed to carefully read (or even read at all) the opinion prior to the government's seeking its admission into evidence and consequently thus failed to object to its *admission*. In other words, counsel failed to object to the *admission* of the opinion because they did not know what was in it. It is objectively unreasonable for a lawyer to fail to familiarize himself with evidence in his possession, as was held in *Williams v. Washington*, 59 F.3d 673, 680 (7th Cir. 1995). The trial transcript shows that counsel were taken by surprise that the statement about Hale's Church having previously "orchestrated a murder" – whether technically the same legal entity or not – was in the opinion. Obviously counsel *should* have known in order to reasonably decide whether to object to its admission. This was a solicitation to commit murder case in which any evidence of supposed

previous murders associated with Hale or his Church obviously posed a substantial risk of prejudice.

**h. Counsel deliberately elicited testimony from Evola that a person had told him that Hale had solicited that person to go on a shooting spree.**

Counsel elicited testimony from Evola that John Yonkers had told him that Hale had solicited him “to do what Ben [Smith] did,” namely, to murder people. (Appx. 278-290.) Recognizing the significant, prejudicial effect of this testimony, the court stated, “[t]hat was pretty damaging” (Appx. 289-290) and recommended that counsel move to strike it, but counsel refused to do so.

The Sixth Circuit has found that counsel’s strategy of affirmatively eliciting testimony from witnesses regarding an uncharged act – in a professed attempt to show that the victim was lying about the act and thus to call into question her testimony about the charged act – and counsel’s failure to request a limiting instruction on the use of this evidence, falls outside the range of professionally competent assistance and is prejudicial. *White v. McAninch*, 235 F.3d 988, 997-1000 (6th Cir. 2000). This is exactly what happened in Hale’s case.

The district court believed that this deliberate elicitation of testimony clearly damaging to their client – and inadmissible hearsay testimony at that – was objectively reasonable. (Appx. 124-127.) However, even if it fell under a theoretical tactic or strategy, seeking hearsay testimony that one’s client has solicited somebody else to go on a shooting spree – especially in a solicitation to commit murder case – was an objectively *unreasonable* tactic or strategy and, furthermore, it was objectively unreasonable for counsel to think that such testimony was admissible in the first place since whatever Yonkers told Evola was plainly inadmissible hearsay. Thus, due to counsel’s actions, the jury was told that Hale had solicited another person to kill people without Hale having any chance to refute such a false and damaging claim. Furthermore, due to the obvious hearsay nature of whatever Yonkers supposedly told Evola, objectively reasonable counsel would have at least

asked for a ruling from the court as to the admissibility of the testimony before putting it in front of the jury.

**i. Counsel failed to prepare Hale to testify on his own behalf.**

Although Hale had repeatedly expressed a desire to testify, counsel failed to prepare him in case he chose to do so. (Appx. 68-69). Counsel's failure to prepare Hale for testifying (or the possibility of testifying) and their advising him to waive his right to testify was based, at least in part, on counsel's failure to understand the facts of his case and, thus, was deficient since this failure was not based on reasoned strategic judgment. In other words, the jury was denied the truth of Hale's case from his own testimony due to counsel's lack of preparation and this lack of preparation was due to counsel's failure to understand the facts of Hale's case. Although Hale waived his right to testify, this waiver was based on counsel's advice which was again deficient due to counsel's failure to understand the facts. Hale only waived his right to testify, not his claim of ineffective assistance based on the deficiencies of counsel that prompted it. Furthermore, after failing to prepare for even the *possibility* that he would testify, counsel told Hale during trial that, "I'm not prepared to ask you anything." (Appx. 68, ¶ 26-27.) Thus, Hale was denied an informed, reasoned, effective choice in deciding whether to testify. Counsel's failures thus constructively denied him his constitutional right to testify and thus fell below the standard of reasonable conduct for a defense attorney. Had he testified, there is a better than negligible chance that his trial would have had a different result.

**j. Counsel's telling the jury that Hale deserved to be convicted on a moral basis and similar hostile remarks was objectively unreasonable.**

What the district court in denying this instance of ineffective assistance (Appx. 144-145) apparently did not appreciate was that counsel did not have to choose between severe attacks upon their client or being his "kindred spirit." There is, rather, a vast, reasonable middle ground. Nor is

it true that counsel's attacks were directed at Hale's beliefs as implied by the court but rather were directed at Hale *personally*. (See Vol. 11 at 57; Vol. 10 at 16; Vol. 11 at 48, 119.) Notably, furthermore, the court left out of its opinion the worst attack of all: counsel's statement that Hale "deserves" to be convicted "on a moral basis." (Vol. 11 at 48.) This was an invitation to convict and accordingly objectively unreasonable. Hale does not dispute that counsel acted properly by distancing themselves from his *beliefs* and has never quarreled with them doing so. However, counsel crossed the line by attacking him personally, by stating that he deserved to be convicted, and by making derogatory comments, gesticulations, and facial expressions towards him in the presence of the jury that were not capable of being captured by the court reporter. (See Appx. 68, ¶ 25; Doc. # 8-3 at 21, ¶ 9.) Reasonable jurists in a case similar in many respects to Hale's found that such attacks can constitute deficient performance. See *Rickman v. Bell*, 131 F.3d 1150, 1154-60 (6th Cir. 1997). A defendant may be able to show that his counsel was ineffective as a result of animosity harbored by counsel and counsel's concession of animosity makes it "appropriate to scrutinize counsel's performance with a somewhat more critical eye." *Hale v. Gibson*, 227 F.3d at 1313 n.4, 1314.

**k. The cumulative effect of counsel's errors rendered the jury trial fundamentally unreliable and hence unfair.**

Hale's trial was permeated with many errors and errors of such magnitude that his convictions are thus unreliable. Although several of the errors are reversible in their own right, even if this Court finds that some are individually harmless, the *cumulative* effect of all of the errors was so substantial and injurious that it affected Hale's substantial rights and undermined and infected his right to a fair and reliable trial and, therefore, cannot be considered harmless. The combination of an erroneously conceded federal case and inaccurate recording and transcript; elicitation of hearsay

testimony and documentation that Hale and his Church had solicited prior murders; the linking of him to “terrorism” by virtue of the books he espoused; faulty jury selection and his absence from nearly half of it; and other errors of counsel coupled with the admission of the Ben Smith evidence, all undermine confidence in the reliability of the verdict and produced a trial that violated Hale’s Fifth Amendment due process rights as well. “Trial errors which in isolation are harmless might, when aggregated, alter the course of a trial so as to violate a petitioner’s right to due process of law.” *Alvarez v. Boyd*, 225 F.3d 820, 824 (7th Cir. 2000). As the Seventh Circuit has also stated, “[t]hough we examine each example of incompetence individually, we must also consider their cumulative effect in light of the totality of circumstances.” *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984), *citing Strickland*. See also, *Washington*, 59 F.3d at 682, (“a petitioner may demonstrate that the cumulative effect of counsel’s individual acts or omissions was substantial enough to meet *Strickland*’s test”).

In a case remarkably similar to Hale’s, counsel was ineffective by failing to call numerous witnesses who would have provided exculpatory testimony, by failing to understand petitioner’s defense theory, by assuming a generally blasé attitude toward the defense and by failing to challenge potentially biased jurors. See *Berry v. Gramley*, 74 F.Supp.2d 808, 811, 817 (N.D. Ill. 1999) (“[h]ad [counsel] taken the time and made the effort to prepare his case, [counsel] would have understood the nature of petitioner’s defense theory ...;” “[t]he prejudice to defendant is obvious: the jury that convicted him never considered material evidence that supported petitioner’s version of the facts and directly contradicted the prosecution’s evidence;” “petitioner has made the required showing that there is at least a reasonable probability that the jury would have seen matters differently had the defense presented the corroborating and exculpatory evidence discussed above”).

The cumulative effect of these errors cannot be considered harmless and Hale's convictions should be reversed.

**3. The district court erred when it denied an evidentiary hearing prior to ruling against Hale on his ineffective assistance of counsel claim.**

Hale requested an evidentiary hearing and the district court denied it on the basis that the files and records conclusively showed that he was not entitled to any relief. (Appx. 72, 98, 152.) 28 U.S.C. § 2255 unambiguously requires that an evidentiary hearing be granted “unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief ...” 28 U.S.C. § 2255. Therefore, unless the factual assertions made by the defendant are “patently frivolous” or “palpably incredible,” if a colorable claim for relief has been made, the defendant has the right to be heard and his motion cannot be summarily dismissed. *Machibroda v. United States*, 368 U.S. 487, 495-496 (1962).

The district court's denial of an evidentiary hearing is reviewed for abuse of discretion. *Galbraith v. United States*, 313 F.3d 1001, 1009 (7th Cir. 2002) “[A]n error of law is, by definition, an abuse of discretion ...” *Almonacid v. United States*, 476 F.3d 518, 521 (7th Cir. 2007). *See also*, *Bruce v. United States*, 256 F.3d 592, 598-99 (7th Cir. 2001) (the district court abused its discretion in refusing to conduct an evidentiary hearing on a failure to investigate claim, where the affidavits of trial counsel, defendant, and the prospective alibi witnesses presented questions of fact as to whether counsel adequately assessed the potential testimony of these witnesses).

In Hale's case, the “files and records” including numerous affidavits and declarations (including Hale's declarations) clearly show that Hale has made specific factual allegations that state

a claim on which relief could be granted.<sup>10</sup> Because Hale alleged credible, non-conclusory evidence supporting a finding that trial counsel were ineffective, he was entitled to a hearing. Only by granting a hearing to afford the defendant an opportunity to prove the allegations can the function of 28 U.S.C. § 2255 be served. *Machibroda*, 368 U.S. at 495. The district court abused its discretion when it denied Hale's § 2255 motion without conducting an evidentiary hearing.

## VII. CONCLUSION AND REQUESTED RELIEF

For the above-stated reasons, this Court should reverse and vacate Hale's convictions and sentences on all counts and order his release from custody unless the government should elect to retry him.

DATED this 24th day of July, 2012.

Respectfully submitted,

*s/Clifford J. Barnard*

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<sup>10</sup> Hale submitted 15 affidavits and declarations in support of his § 2255 motion. (Doc. #'s 8-3, 36-2, 52-1 and 65-1.)

**CERTIFICATE OF COMPLIANCE**

Please complete one of the sections:

**Section 1. Word count**

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*s/ Clifford J. Barnard*

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Clifford J. Barnard  
Attorney for Appellant Hale

**CERTIFICATION OF DIGITAL SUBMISSION**

I HEREBY CERTIFY that:

- (1) All required privacy redactions have been made and, with the exception of any redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the clerk.
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*s/Clifford J. Barnard*

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Clifford J. Barnard  
Attorney for Appellant Hale

**PROOF OF SERVICE**

I hereby certify that on this 24th day of July, 2012, I electronically filed the foregoing *Brief and Required Short Appendix of Petitioner-Appellant Matthew Hale* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail address(es):

A.U.S.A. David E. Bindi  
*david.bindi@usdoj.gov*

and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participant in the manner (mail, hand-delivery, etc.) indicated by the non-participant's name:

Matthew Hale  
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U.S.P.-Florence ADX  
P.O. Box 8500  
Florence, CO 81226-8500

*via U.S. Mail*

*s/Clifford J. Barnard*

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Clifford J. Barnard  
Attorney for Petitioner-Appellant Hale

**CIRCUIT RULE 30(d) STATEMENT**

Undersigned counsel hereby certifies that all required materials are in the Appendix as required by parts (a) and (b) of Circuit Rule 30 and all required materials are in the Separate Appendix as required by part (b) of Circuit Rule 30. The attached short appendix consists of the following:

- (1) *Opinion and Order*, Case No. 1:08-cv-00094, Document 50 (81 pages); and
- (2) *Opinion and Order*, Case No. 1:08-cv-00094, Document 68 (22 pages).

*s/Clifford J. Barnard*

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Clifford J. Barnard  
Attorney for Petitioner-Appellant Hale

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

|                           |   |                |
|---------------------------|---|----------------|
| MATTHEW HALE,             | ) |                |
| Defendant-Movant,         | ) |                |
|                           | ) |                |
| v.                        | ) | No. 1:08 CV 94 |
|                           | ) |                |
| UNITED STATES OF AMERICA, | ) |                |
| Plaintiff-Respondent.     | ) |                |

OPINION AND ORDER

This matter is before the court on defendant-movant Matthew Hale's motion pursuant to 28 U.S.C. § 2255 (DE #1), fully-briefed by his brief in support (DE #18) and addendum (DE #8-3), the United States of America's (hereinafter, "government") amended response (DE #30), and Hale's reply brief (DE #36) and exhibits thereto (DE #36-1). In addition, Hale obtained leave to file a supplemental brief amending one of his arguments (DE #37), to which the government filed a responsive brief (DE #42) and Hale a reply brief. (DE #46). Hale also recently filed a supplemental notice. (DE #48.) Because this court's review of the parties' briefs, supporting documentation and the record of prior proceedings in this action allows the court to determine that the facts Hale has alleged, even if proven, would not entitle him to relief, an evidentiary hearing is not required. 28 U.S.C. § 2255(b); *Bruce v. United States*, 256 F.3d 592, 597 (7th Cir. 2001); *Stoia v. United States*, 22 F.3d 766, 768 (7th Cir. 1994).

Hale was the leader, with the title "Pontifex Maximus," of an organization known as the World Church of the Creator (hereinafter, "WCOTC"). The WCOTC was involved in civil trademark litigation with another organization using the term "Church

of the Creator,” see *TE-TA-MA Truth Foundation-Family of URI, Inc. v. World Church of the Creator*, 297 F.3d 662 (7th Cir. 2002), being presided over by United States District Judge Joan H. Lefkow. Hale was indicted for, and stood trial on, two counts of solicitation to commit a crime of violence—the murder of Judge Lefkow—in violation of 18 U.S.C. § 373, and three counts of obstruction of justice in violation of 18 U.S.C. § 1503. On April 26, 2004, the jury found him not guilty of one of the solicitation counts, and guilty of the remaining four counts. On November 10, 2004, the court partially granted Hale’s motion for a judgment of acquittal pursuant to FED. R. CRIM. P. 29(c), vacating the verdict on one of the obstruction of justice counts. On April 6, 2005, the court sentenced Hale to consecutive terms of imprisonment to arrive at a total term of imprisonment of 480 months. Hale took a direct appeal, and his convictions and sentence were affirmed. *United States v. Hale*, 448 F.3d 971 (7th Cir. 2006). His petition for *certiorari* was denied on October 1, 2007. *Hale v. United States*, 549 U.S. 1158 (2007). His § 2255 motion was timely filed within one year thereafter.

A § 2255 motion allows a person in federal custody to attack his or her sentence on constitutional grounds, because it is otherwise illegal, or because the court that imposed it was without jurisdiction. Hale raises two grounds which he believes require that his conviction be vacated: violation of his right under the Sixth Amendment to the United States Constitution to effective counsel; and violation of his right under the Fifth Amendment, and under FED. R. CRIM. P. 43(a), to be present at every critical stage of his trial.

## **I. Ineffective assistance of counsel**

The test to determine whether a defendant's right to assistance of counsel as provided by the Sixth Amendment has been violated is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test has two prongs. First, the "defendant must show that the performance of counsel fell outside the 'range of competence demanded of attorneys in criminal cases' -i.e., that it 'fell below an objective standard of reasonableness.'" *Barrow v. Uchtman*, 398 F.3d 597, 603 (7th Cir. 2005) (quoting *Strickland*, 466 U.S. at 687). There is a strong presumption of competence. *Id.*

Second, the defendant must show that he suffered prejudice as a result of his counsel's ineffectiveness. *Id.* In other words, the defendant must demonstrate "a reasonable probability that, *but for* counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The court should deny an ineffective assistance of counsel claim if the defendant has made an insufficient showing on either prong. *Strickland*, 466 U.S. at 697. The court may assess the prongs in whichever order it chooses. *Id.* Additionally, while Hale makes multiple allegations of error to support his claim that his counsel was constitutionally ineffective, it must be kept in mind that:

[I]neffective assistance of counsel is a single ground for relief no matter how many failings the lawyer may have displayed. Counsel's work must be assessed as a whole; it is the overall deficient performance, rather than a specific failing, that constitutes the ground of relief.

*Peoples v. United States*, 403 F.3d 844, 848 (7th Cir. 2005) (citing *Bell v. Cone*, 535 U.S. 685, 697 (2002); *Strickland*, 466 U.S. at 690; *Holman v. Gilmore*, 126 F.3d 876, 881-84 (7th Cir. 1997)).

*A. Overview of Hale's Ineffective-Assistance Claim*

With this in mind, although Hale has broken his argument into nine "instances" of ineffective assistance (nearly every instance consisting of several different allegations of error), one overarching theme permeates almost every allegation in one way or another. This makes an overall comment on that theme appropriate, that is, a look at the forest before getting lost in the trees. The theme, stated as the first "instance" of ineffective assistance (with six sub-allegations of error), is that, with respect to Hale's conviction on the solicitation count in violation of 18 U.S.C. 373, his counsel's performance fell below the level of competence required because he pursued the wrong defense, and not Hale's "best" and "true" defense. Hale argues that if his attorney had pursued Hale's "actual, *bona fide* defense which was much stronger," taking that course "would likely have resulted in Mr. Hale's exoneration." (DE #18 at 13.)<sup>1</sup>

This argument, to be blunt, is preposterous. First, because it is built entirely on the incorrect premise that if his attorney failed to pursue Hale's "best" defense, that

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<sup>1</sup> Although it flouts Bluebook convention, the advent of the court's electronic filing system (CM/ECF) makes it most easy to pinpoint references to documents in the file by citing their docket number and page number *assigned by the CM/ECF system*, printed in blue at the top of every page image, not the physical page number found on the document itself. The court will use this method, and to identify documents filed in the criminal case file, the citation format will be "1:03CR11 DE #x at y."

automatically equals ineffective assistance of counsel. That premise finds no support in the law governing ineffective-assistance claims. As long as Hale's attorney utilized a defense strategy that was not so misguided that it fell outside the wide range of professional competence, Hale received constitutionally-effective representation. As the Court of Appeals has remarked, "the Constitution does not ensure that every defendant receives the benefit of superior advocacy – how could it, given that half of all lawyers are below average?" *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir. 1994).

Second, and more compelling, it is the court's view that Hale's attorney in fact did utilize the best defense, or at least one better than the one he proposes now. But even if the court's opinion in this regard is incorrect, and Hale's opinion more accurate, clearly the defense pursued was not so beyond the pale that it fell outside the wide range of professional competence. Comparing the essence of the defense that was used to the defense Hale believes should have been used makes this plain.

The defense Hale's attorney used, briefly stated, was that the evidence showed that Hale lacked the intent to solicit a crime of violence, instead it was the government's informant, Tony Evola, who proposed the crime and solicited Hale's participation through repeated entreaties. Hale never agreed to the plan or, if he did, he did so only because his will was overborne by Evola's persuasion. There was sufficient evidence to support this defense, and the court gave the jury an instruction on entrapment as final instruction number 20. (1:03CR11 DE #160 at 23.)

Now, Hale argues that pursuing an entrapment defense was not a strategic choice, but instead an error that resulted from his attorney's<sup>2</sup> failure to understand the basic facts of his case. Hale argues that, had his attorney understood the facts, counsel would have realized that the evidence clearly showed that Hale believed he and Evola were discussing the murder of a lawyer named James Amend, not Judge Lefkow, and that once Hale realized that Evola actually meant Judge Lefkow, Hale "categorically rejected" the plan. (DE #18 at 2; DE #8-3 at 9 ¶ 8, 10-11 ¶ 13.) In other words, Hale is contending that it would have been a better defense for his attorney to admit that Hale wanted Evola to murder *someone*, essentially conceding the most difficult material elements of the crime—Hale's intent that Evola commit a felony involving physical force, and his solicitation of Evola to commit that felony—and hinging his entire defense on his supposed misunderstanding of who that someone was. Bluntly put, Hale's "bona fide" defense, as he describes it now, is that the jury should have been shown that he wanted Evola to murder lawyer James Amend, not Judge Lefkow.

Based on the strength of the government's case, however, the court has no doubt that, had this defense been pursued, Hale would nevertheless have been found guilty and would be arguing now that his attorney was ineffective for admitting his murderous intent instead of denying that intent and pursuing an entrapment defense. Viewing the argument in these simple terms—that it would have been a better defense

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<sup>2</sup> Hale was represented by co-counsel Thomas Durkin and Patrick Blegen. For convenience, however, the court will most often use a singular reference to counsel in this order.

to admit that Hale and Evola were agreeing to the murder of Amend, than to admit that Judge Lefkow was being discussed, but it was Evola who solicited Hale — is to see how meritless it is to claim that the defense chosen was so outside the realm of competence as to be ineffective. Perhaps this is why Hale doesn't argue that the defense used was a strategic choice at all, instead contending that his attorney accepted that Judge Lefkow was the object of the plot, using the wrong defense because he didn't fully investigate and understand the case and so did not understand that the alternate defense existed.<sup>3</sup>

To be absolutely clear, the court rejects Hale's argument that his defense counsel's choice of defense was an ignorant blunder, and not a strategic choice. According to Hale, he plainly and repeatedly informed his counsel that he initially thought that he and Evola were discussing Amend, and not Judge Lefkow, and of evidence that would support this theory, but his attorney refused to investigate, develop and use that defense. (DE #8-3 at 9-10 ¶¶ 8, 11, 12.) Thus, by definition, his attorney did make a choice as to what defense to use. The court must view that choice with great deference, and to demonstrate ineffective assistance, Hale must overcome a presumption that, under all of the circumstances, his attorney's choice "might be considered a sound trial strategy." *Strickland*, 466 U.S. at 690 (internal quotation marks and citation omitted); *Valenzuela v. United States*, 261 F.3d 694 (7th Cir. 2001). It is hard

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<sup>3</sup> Hale himself shows this not to be the case. His affidavit in support of his motion explains how he discussed the facts supporting this defense with both of his defense counsel. (DE #8-3 at 9-10 ¶¶ 8, 11, 12.) Obviously, defense counsel didn't believe this defense option to be the best strategy to use at trial.

to imagine any set of circumstances where admitting solicitation to commit murder, and arguing about the identity of the victim, would be such a better strategy that it would make a decision to contest the intent element—in a case with enough evidence to support an entrapment instruction<sup>4</sup>—an unsound strategy. Hale has certainly not persuaded the court that this is that case.

It should be noted that the court arrived at its understanding of Hale's argument—that he would have admitted his solicitation of Evola to murder Amend—*before* the court read the government's response, in which the government reaches the same conclusion. In his reply brief, Hale vigorously protests this conclusion, arguing that "counsel would not have been forced to concede that Mr. Hale approved of or solicited Amend's murder." (DE #at 1.) Whatever the nuances of this argument may be, the court fails to appreciate them. The point cannot be made clearly enough that Hale's original argument is based on the idea that he would have admitted his solicitation of Evola to murder Amend, so that his later comments could be cast as a rejection of the "new" plan to murder Judge Lefkow. As stated in his opening brief:

[T]he jury found Mr. Hale guilty without the benefit of evidence proving . . . that Mr. Hale thought Evola was saying "consider it done" to lawyer Amend's murder, that the December 9, 2002 email told Mr. Hale that

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<sup>4</sup> In his reply brief Hale argues that the court, in its order denying his post-trial motion for a judgment of acquittal or new trial, has already found that "no reasonable jury could have found that Mr. Hale had been entrapped," logically meaning that choosing to use that defense was unreasonable. (DE #36 at 4.) The court made no such finding. The court's finding was that Hale's argument that no reasonable jury could have found that he was not entrapped (i.e., that *any* reasonable jury would have found entrapment) was, based on the evidence, incorrect. (1:03CR11 DE 249 at 18-20.)

Evola had *changed* his target from a “Jew rat” (lawyer Amend) to a “*femala* rat” (Judge Lefkow); and hence when Mr. Hale repeatedly said on December 17, 2002, that he could not be a party to Evola’s plot against Judge Lefkow, he was absolutely rejecting Evola’s new proposal to kill Judge Lefkow rather than indulging in “plausible deniability.”

(DE #18 at 14.) All that the argument in Hale’s reply does – for example, he argues that he would have testified that his response “good” when Evola said “consider it done” as to Judge Lefkow’s murder was merely a facetious remark (DE #36 at 2) – is split hairs and show how difficult his supposed “best” defense would have been, and so demonstrate why his counsel’s decision to use a different defense strategy was not outside the acceptable boundaries of professional competence.<sup>5</sup>

Finally, even were the court to accept Hale’s argument that the defense used was a blind error, not a strategic choice, or was such a poor strategy as to fall below the minimum threshold of professional competence, and proceed to analyze Hale’s claim solely in terms of whether he suffered prejudice, his ineffective assistance claim fails that prong of the test as well. This is not only because of the strength of the evidence against Hale, but also because the defense he now argues was stronger is at best weakly

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<sup>5</sup> Hale’s “good” remark occurs during a conversation recorded on December 5, 2002. Hale also argues that during this very conversation he told Evola that he (Hale) was “gonna fight within the law.” DE #36 at 2). That comment, however, came after Evola asked if “we gonna exterminate the rat?” and Hale responded that while he himself was going to “fight within the law,” if Evola wished to “do anything” himself, he could, “[s]o that makes it clear.” That is when Evola responds “consider it done” and Hale says “good.” (1:03CR11 DE 249 at 12.) Moments later, Hale tells Evola that if “something” were to happen to Hale, Evola should be sure to “make sure that . . . the world knows about it in a very strong way” and that he Evola should use his “imagination” as to what that means. (*Id.* at 13.) This entire conversation, in context, shows what a difficult sale Hale’s supposed “best” defense would have been.

supported by the evidence, and the arguments Hale believes his attorney improperly failed to pursue would have played directly into the strength of the government's case.

For example, although Hale argues now that, once he understood that Evola was proposing the murder of Judge Lefkow, he "categorically rejected" the plan (DE #18 at 14), this is a classic attempt to make a silk purse from a sow's ear. Nowhere on the audio recordings or e-mail messages admitted into evidence does Hale tell Evola not to commit such an atrocious crime. Instead, after Evola made it clear that he was discussing the murder of Judge Lefkow,<sup>6</sup> Hale simply stated that he wouldn't be a party to the scheme, told Evola that "whatever a person does is according to the dictates of their own conscience," and compared himself to the fictional POW camp guard Sergeant Schultz, known for comedically exclaiming "I know nothing." (1:03CR11 DE 249 at 16-17.)

The government's theory was that Hale encouraged his acolytes to commit violent acts while at the same time denying personal involvement to create "plausible deniability." This conversation is entirely consistent with that theory, and, had Hale conceded that he was soliciting Evola to murder someone other than Judge Lefkow, the government's case would have been made easier, leaving it necessary to prove only the proposed victim's identity. Even if Hale's defense counsel had done everything which Hale now believes was warranted, the court believes that the evidence – in particular

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<sup>6</sup> This occurs in a tape recording of a conversation occurring on December 17, 2002.

the key conversation Hale focuses on—still strongly indicates that Hale understood Evola’s target from the beginning to be Judge Lefkow, and Hale therefore would still have been found guilty.<sup>7</sup> In short, Hale’s arguments concerning the defense he believes should have been used do not “undermine confidence in the outcome” by showing a reasonable probability that the result of the proceeding would have been different, which means prejudice did not result. *Strickland*, 466 U.S. at 694.

This conclusion means that if the court were to proceed in the narrowest fashion possible, it is not necessary to examine in detail the sub-arguments Hale makes as to why his attorney’s choice of defense was improper. (In fact, the analysis of the entire ineffective-assistance could almost stop here, because Hale’s argument about the defense strategy that should have been used factor into most of his other arguments.) Nevertheless, in the interest of being thorough and because doing so makes it even clearer that Hale’s proposed “wrong target” defense does not show that his attorney pursued a defense so flawed as to be ineffective (that is, looking at the individual trees doesn’t change the court’s opinion of the forest), the court will briefly address each of the individual issues Hale raises in support of that aspect of his ineffective assistance claim, along with its discussion of the remainder of his ineffective-assistance arguments.

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<sup>7</sup> The court has repeatedly explained in prior orders in this case why it disagrees with the theory Hale advances again now, that the surreptitiously-recorded conversations, if properly transcribed, show that he and Evola were discussing Amend, not Judge Lefkow. See, *e.g.*, 1:03CR11 DE 249 at 15-17; 1:03CR11 DE 250-1 at 4-5.

*B. Hale's Specific "Instances" of Ineffective Assistance*

In the analysis that follows, the court tracks Hale's organization of his ineffective assistance claim into nine "instances" of ineffective assistance of counsel, many of those instances being composed of several alleged lapses in counsel's performance. Thus, each of the section headings below is identical to the one used by Hale in his supporting memorandum, enclosing in brackets the numeric designation where it is found in Hale's memorandum, for easy reference to Hale's brief in support. As a result, however, there is some redundancy, because many of Hale's arguments themselves are overlapping. This is not surprising, really, since ineffective assistance of counsel is a single ground for relief, no matter how many mistakes are made, and it is the attorney's overall performance that must be considered. *Peoples v. United States*, 403 F.3d 844, 848 (7th Cir. 2005).

*1. "Failure to Present the Correct Theory of Defense" [Hale's II.B.1]*

First, Hale outlines the reasons why the evidence demonstrates: 1) when Evola initially met with him on December 5, 2002, to propose "exterminating" the "Jew rat," Hale thought that they were discussing lawyer Amend; 2) only after Evola mentioned a "femala rat" in a December 9, 2002, e-mail message did Hale understand that Evola had "switched" the target of the plan to Judge Lefkow; and 3) Hale then met with Evola on December 17, 2002, and categorically rejected the "new plan," by stating he could not "be a party to such a thing." (DE #18 at 14-16.) Hale's argument is that his attorney failed to present additional evidence which would have proved Hale's original

understanding that Evola was proposing the “extermination” of lawyer Amend, and that that failure had the consequence of allowing the jury to accept the government’s theory that the December 17, 2002, conversation with Evola was Hale’s attempt to engage in “plausible deniability,” rather than understanding that Hale was rejecting outright the “new” plan directed at Judge Lefkow.

Before addressing Hale’s elaboration of all of the subparts of this argument, a few overall observations are important. First, Hale has already made essentially this same argument in post-trial motions (1:03CR11 DE ## 219; 221; 233; 245); and the court has already painstakingly explained why, when the evidence is viewed as a whole, the most plausible interpretation of the initial conversation between Hale and Evola is that Hale understood Evola to be referring to the “extermination” of Judge Lefkow. (1:03CR11 DE ## 244 at 4 n.6; 249 at 15 n. 16; 250-1 at 4-5.) The court incorporates all of its prior explanation and analysis here by reference, and nothing Hale discusses now, concerning the additional evidence he asserts that his attorney failed to offer, persuades the court that the evidence should be viewed differently.

Second is a point which the court has not clearly made until now, and which bolsters the court’s view that the most plausible interpretation of the first conversation between Evola and Hale is that both participants understood it to concern Judge Lefkow. Considering that Hale’s assertion is that he “categorically rejected” the new plan after Evola supposedly “switched” the target, it is odd that Hale never expressed disappointment at Evola’s abandonment of the existing plan, surprise, shock or dismay:

*i.e.*, he never said anything to Evola along the lines of “wait a minute, I thought we were talking about Amend, let’s get back to that plan,” or “are you crazy? I don’t want a federal judge murdered!”<sup>8</sup> In his reply brief Hale argues that it was unnecessary for him to “correct” Evola, because he hadn’t solicited Evola to do anything in the first place. (DE #36 at 2.) As has been explained previously and again herein, while that might be a reasonable view of the evidence, it is not the only reasonable view, and is one the jury rejected.

Third, and despite Hale’s reply argument to the contrary, arguing that Hale understood Evola to be talking about attorney Amend, but called the plan off when it switched to Judge Lefkow, would have effectively amounted to a concession that Hale had solicited Evola to murder Amend. Thus, his entire defense would have hinged on whether the jury could have been persuaded that Hale was, in his mind, talking about Amend, not Judge Lefkow. Obviously, this would have been a highly risky strategy,

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<sup>8</sup> As Hale has pointed out throughout his filings in this case and again now, he did tell Evola, after Evola stated that the plan to murder Judge Lefkow was in motion, that the plans were “too serious,” that he wasn’t a party to anything, and that he didn’t “want anything.” However, as the court has stated in prior orders addressing this argument (see, in particular, 1:03CR11 DE #249 at 17 n. 17), these remarks came just after Hale reminded Evola that it was “not exactly wise to tell” Hale anything about the plot. Viewed in the entire context, the remarks are plainly not the “categorical” rejection that Hale claims them to be. What Hale said was: “I’m not gonna have anything done. I’m just . . . saying that whatever a person wants to do and I, I have to be, I just can’t, this is too serious. I just can’t ah, yeah, incredible. Anyway, I don’t want anything, you know. I’m not a party of anything. . . . not encouraging anything, just . . . if they do something, that’s their own business.” A reasonable view of this conversation is that Hale encouraged Evola to continue with the plan by reminding him that whatever he was going to do was his “own business,” while engaging in the “plausible deniability” tactic by asserting that he was not a party and didn’t want anything.

particularly when, as explained herein and in the prior orders and opinions in this case, a completely plausible view of the evidence is that Hale understood the discussion to concern Judge Lefkow from the start.

The court now individually addresses each of Hale's sub-arguments.

*a. "Failure to Understand the Facts of Hale's Case" [Hale's II.B.1.a]*

In this section of his brief Hale makes three points: 1) his attorney failed to understand that Hale's use of the word "information" in a conversation with Evola on December 5, 2002, meant the addresses of several individuals, including Judge Lefkow, which in turn meant that Evola's use of the word "it" later in the conversation referred to all of those addresses, not just Judge Lefkow's, showing that Hale thought lawyer Amend was being discussed; 2) that "part of the reason" for the attorney's failure to understand was that the attorney "*failed to adequately consult* with Mr. Hale prior to trial, refusing to visit him in jail and *refusing to investigate* Mr. Hale's adamant and repeated statement[s] to counsel that Judge Lefkow was not 'the rat' or 'Jew rat' referred to" in the conversation, lawyer Amend was" (DE #18 at 16-17); and 3) counsel failed to present this defense because, as he admitted during closing argument, he didn't think a defense was necessary, thereby "testing the fates with Mr. Hale's freedom." (DE #18 at 17.)

As to the first point, this is the same argument Hale made in post-trial motions, which the court has already considered and rejected. (1:03CR11 DE #25-1 at 4-5.) The conversation Hale is referring to is as follows:

Evola: Well, I got your e-mail about the Jew judge . . .

Hale: Right.

Evola: . . . you wanting his address and [all his rats'].<sup>9</sup>

Hale: That information, yes, for educational purposes and for whatever reason you wish it to be.

Evola: Are we gonna . . . I'm workin' on it. I, I got a way of getting it. Ah, when we get it, we gonna exterminate the rat?

Recorded conversation of 12/05/02.

The only thing the court will add to its prior discussion of this argument, directly in response to Hale's contention that his attorney didn't understand that "information" referred to several addresses, is that it is doubtful that defense counsel—or for that matter, anyone hearing/reading the conversation quoted above (no matter that the transcript of the bracketed portion actually read "the other rats")—would fail to understand that in context, "that information" may very well have meant several addresses, not just Judge Lefkow's. In fact, as the government points out in response to Hale's motion (DE #30 at 6), defense counsel's cross-examination of Evola shows that counsel understood that to be the case: "Now, that e-mail I just showed you, December 4, that was an e-mail where he's [Hale] asking for addresses, correct?" (Tr. Vol. 9 at 76.) "And it says in there [December 5 e-mail] that he's [Hale] in the process of getting the people's home addresses in there, correct?" (Id. at 79.)

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<sup>9</sup> The transcript of this conversation furnished for the jurors' reference actually stated "the other rats" (without an apostrophe). For the purposes of the discussion herein, the court accepts Hale's claim that what was actually said was "all his rats'." In the court's view, whichever version is correct is not critical, because both are equally susceptible of allowing the interpretation of "that information" to mean all of the addresses, not just Judge Lefkow's.

More importantly, that understanding—that Hale was seeking to obtain multiple addresses—doesn't change a thing. This is because Evola's focus in the conversation is singular: the email about "the Jew judge," Hale wanting "his address"<sup>10</sup> and when the information was obtained using it to exterminate "the rat." Hale never explains why it logically follows, from any interpretation of this conversation, that "the rat" was lawyer Amend.<sup>11</sup> Apparently this is to be inferred from the phrase "his address and all his rats," in other words, "his" refers to the "Jew judge" and "all his rats" must therefore refer to the attorneys involved,<sup>12</sup> one of whom was Amend.<sup>13</sup> And if that is the interpretation, Hale also doesn't explain why he would have understood Evola to be singling out Amend from the group of attorney rats as the one rat chosen for extermination. In fact, Hale's insistence that the phrase "all his rats" was used makes it seem more—not less—likely that he understood the discussion to concern Judge

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<sup>10</sup> At that time, Evola thought that Judge Lefkowitz was a male. (Tr. Vol. 9 at 75.)

<sup>11</sup> Hale does show that there is evidence that he often referred to Amend as the "Jew rat." However, this is not compelling, because the term "rat" was commonly used to refer to perceived enemies of Hale's organization. (Tr. Vol. 9 at 75-76.)

<sup>12</sup> Hale offers no explanation why Evola, while distinguishing between the attorney rats and the judge, would nevertheless describe the attorney rats as "his" rats—that is, belonging to the judge. This incongruity suggests the transcription of the conversation, using the phrase "the other rats" instead of "all his rats," was in fact correct.

<sup>13</sup> Without directly making the point, Hale suggests this by pointing out that later in the conversation Evola stated he would get the address of the "Jew judge, *lawyer rat*." (DE #18 at 15.) However, there was evidence at trial that it was common for Hale and his followers to refer to anyone perceived to be against their interests as a "rat." (Tr. Vol. 9 at 75-76.)

Lefkow: wouldn't it be more likely to consider exterminating the leader of the group, than one of several unnamed rats?

Hale's second point is that "part of the reason" his attorney supposedly failed to understand that Hale thought Evola was initially proposing the murder of lawyer Amend was that he "*failed to adequately consult* with Mr. Hale prior to trial, refusing to visit him in jail and *refusing to investigate* Mr. Hale's adamant and repeated statement[s] to counsel that Judge Lefkow was not 'the rat' or 'Jew rat' referred to" in the conversation, lawyer Amend was." (DE #18 at 16-17.) Besides the internal contradiction in the sentence — how could Hale have made repeated statements to his attorney if his attorney wasn't meeting with him?<sup>14</sup> — Hale fails to explain how any investigation would have uncovered evidence revealing Hale's thought processes at the time he and Evola had the initial conversation.<sup>15</sup>

For example, if Hale had a contemporaneous conversation with another person confirming that he and Evola were plotting to murder Amend, he hasn't revealed that evidence. In fact, and to the contrary, there was evidence at trial that Hale

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<sup>14</sup> The assertion made in Hale's brief, that his attorney refused to visit him in jail and did not consult with him adequately prior to trial, is not borne out by Hale's declaration in support of his motion. Although that declaration suggests that attorney Thomas Durkin may not have consulted with Hale as often as Hale would have liked, co-counsel Patrick Blegen also represented Hale, and Hale's declaration shows that he and Blegen frequently consulted and discussed the issues considered herein.

<sup>15</sup> Of course, a further reason not to conduct any such investigation would be that a strategic choice to pursue the entrapment defense had already been made. Effective representation includes making reasonable decisions that particular investigations are unnecessary. *Strickland*, 466 U.S. at 691.

contemporaneously asked another of his followers to murder Judge Lefkow,<sup>16</sup> a further reason why the defense Hale propose now would have been a poor strategic choice. In short, however, relief will not be granted under § 2255 based on an assertion that an inadequate investigation was conducted when the movant does not explain what the investigation would have uncovered and how it would have helped his defense.

*Hardamon v. United States*, 319 F.3d 943, 951 (7th Cir. 2003).

Hale's third point is that his lawyer didn't present the defense Hale now believes would have been better, because the attorney didn't think it was necessary. This really isn't an argument that Hale received ineffective assistance of counsel, it is simply a reiteration of Hale's belief that his attorney was ineffective for not pursuing the alternative defense Hale now argues would have been better. The court will only add that the best, and perhaps only, evidence of what Hale understood Evola to have been proposing at the time they first spoke would have had to come in through Hale's own testimony at trial, as Hale admits: "Counsel had, but failed to present, the testimony of . . . Mr. Hale himself that would have refuted the government's claim." (DE #18 at 14.)<sup>17</sup>

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<sup>16</sup> This was the basis for the solicitation charge involving Jon Fox, on which the jury found Hale not guilty. Although, in the court's view, the evidence on this charge was quite strong, the government's main witness, Fox, was shown by the defense to be an admitted liar and to have reasons to testify against Hale to advance personal interests.

<sup>17</sup> The ellipsis omits a reference to two other witnesses who would have testified that Hale had referred to Amend as a "Jew rat." That testimony does not, as Hale argues now, refute the government's contention that the "rat" in the conversation was the "Jew judge."

The decision whether or not to testify in his own defense was Hale's alone, *Rock v. Arkansas*, 483 U.S. 44 (1987); *United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984), and Hale, who is an attorney, has not alleged that he did not understand that: in fact, he executed a written waiver of his right to testify. (1:03CR11 DE #147.)<sup>18</sup> Taking the stand to testify in one's own defense is typically not a wise tactical decision, however, *Curtis*, 742 F.2d at 1076, and undoubtedly that was true in this case. The court cannot fault defense counsel for not putting Hale on the stand to testify in support of what would have been, for all the reasons given herein, an ill-chosen defense.

*b. "Failure to Advocate the Truth of Mr. Hale's Case" [Hale's II.B.1.b]*

In this subsection of his brief, Hale simply reiterates his previous argument that his attorney did not pursue the correct defense. He adds only that when his attorney cross-examined Evola, he pressed Evola to admit that on December 5, 2002, Evola was talking about killing a judge, which was "adverse to the truth and very detrimental to the defense," and again shows that "counsel failed to realize and argue that Mr. Hale had rejected Evola's plan on December 17, 2002." (DE #18 at 17.) As the government points out in its response, obtaining such an admission would have supported Hale's entrapment defense, and, for the reasons explained above, the court does not fault counsel's pursuit of an entrapment defense in place of the supposedly better defense

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<sup>18</sup> Hale's argument that he executed this waiver only as the result of ineffective assistance of counsel in connection therewith is discussed *infra*.

that Hale thought Evola meant to murder Amend. Thus, this argument lends no support to Hale's claim of ineffective assistance.

*c. "Failure to Call Exculpatory Witnesses Greenwald, Schlismann, Reardon and Mr. Hale Himself to Support This Defense" [Hale's II.B.1.c]*

Hale argues that these witnesses should have been called, because all have testified that Hale had previously used the term "Jew rat" to refer to lawyer Amend, thus contradicting the government's claim that Hale's December 5, 2002, email message concerned Judge Lefkow. In addition, Hale and Schlismann would have testified that Evola himself had used the term "Jew rat" to refer to lawyer Amend.

As the government points out in its response, during defense counsel's cross-examination of Evola, Evola admitted that "rat" was a term used frequently for "traitors or somebody who was against the church," and that Amend was a traitor so the term could have been used on occasions for him. (Tr. Vol. 9 at 7-76.) Therefore, not calling additional witnesses to testify to essentially the same fact does not fall below a minimal standard of competence. This is particularly true where, as the government argues, these witnesses were likely to create other problems for the defense. For example, proposed witness Greenwald, an attorney who had previously represented Hale in several civil cases, states in his declaration that he would have testified that Hale had clearly expressed that he believed only in peaceful activism and was opposed to violence and illegal conduct. (DE #8-3 at 4 ¶ 2.) This testimony would have been difficult to reconcile with the defense that Hale proposes, that he was soliciting Evola to

murder Amend, rejecting the plan only when Judge Lefkow became the target; moreover, failing even then to counsel Evola against carrying out the plan. In short, there was no error in failing to present essentially cumulative evidence that “rat” was a term frequently used by Hale to refer to Amend and others.

*d. “Failure to Hold the Government to its Burden of Proving That Evola Was Referring to Judge Lefkow and Not Lawyer Amend on Dec. 5, 2002” [Hale’s II.B.1.d]*

Hale’s argument is that “there was no direct evidence – only attorney argument – that the ‘rat,’ ‘Jew rat,’ referred to in the Dec. 5, 2002 conversation was Judge Lefkow,” and that defense counsel abdicated his duties by failing to argue during closing that the government had failed to meet its burden of proof on that issue. This argument ignores the fact that cases can be proved entirely by circumstantial evidence, and as has been discussed herein and in prior orders in the criminal case, there was ample circumstantial evidence to allow a reasonable jury to conclude that Hale and Evola were referring to Judge Lefkow. Moreover, in context, the conversation itself is essentially direct evidence of who was meant by “rat.” Hale’s attorney did not fail to hold the government to its burden of proof.

*e. “Erroneous Stipulation to the Accuracy of the Government’s Transcripts” [Hale’s II.B.1.e]*

During many (if not most) of his meeting with Hale over a period of several years, government-informant Evola wore an electronic device which allowed the government to monitor and record the conversations. Several of the recordings were admitted as evidence and played for the jury. Transcripts of the recordings were

furnished for the convenience of the jurors as they followed along. Hale argues that his attorney's stipulation to the accuracy of the transcripts was an error, because the transcripts themselves contained errors which harmed his defense or the defense which should have been used. Specifically, Hale complains of: 1) an extra comma inserted between "lawyer rat" which turned that reference to one person into a reference to two persons; 2) that there should have been an apostrophe making "rats" possessive so the jury would have understood that Evola's reference to Hale "wanting his address and the other rats" meant Hale had asked for four addresses,<sup>19</sup> in turn indicating that there was no proof that Judge Lefkow was "the rat, Jew rat" in question in the conversation; and 3) that a transcript should not have indicated that Hale had "chuckled" when Evola expressed designs on Judge Lefkow's life.

As the government indicates in its response, the jurors were repeatedly instructed, as the recordings were played, that the transcripts were furnished only for assistance, that the recordings themselves were the evidence, and that, should they notice a discrepancy with the transcript, they should consider only what they heard on the recording. (See, *e.g.*, Tr. Vol. 7 at 9, 13, 18.) The final jury instructions the court read to the jury, and provided each juror a copy of during deliberations, repeated this information as Instruction No. 14, specifically stating: "It is up to you to decide whether the transcripts correctly reflect what was said" and that "[i]f you noticed any difference

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<sup>19</sup> It should be noted that, with or without an apostrophe, the court thinks it is entirely clear, whether the transcript or the recording is relied on, that the meaning of the statement was "his address and the other rats['] addresses].".

between what you heard on the recordings and what you read in the transcripts, you must rely on what you heard, not what you read.” (1:03CR11 DE #160 at 16.) Juries are presumed to follow the court’s instructions. *United States v. Emerson*, 501 F.3d 804, 813 (7th Cir. 2007). Therefore, if the recordings were as Hale states, any inaccuracies in the transcripts caused no prejudice.

Hale’s response is that the presumption does not matter here because tape recordings do not show punctuation, and so, without a defense objection, the jurors were “much more likely” to accept the “incorrect and misleading version” in the transcripts. The basis for the instruction given by the court, however, is that jurors can discern such things as whether or not there was a spoken pause, which would be indicated by a comma in the transcript. Therefore, if the mistakes in the transcript are as plain as Hale argues, then the jury heard the “truth,” and is presumed to have followed the instructions. If the mistakes are not as plain as Hale believes – and, with the exception of the apostrophe, this seems to be the case, then defense counsel did not err by failing to object to the portions Hale disputes now. In short, the transcript issue is a non-issue.

*f. “Failure to Impeach the F.B.I. Agent Regarding the Transcripts’ Inaccuracies” [Hale’s II.B.1.f]*

Hale argues that, had his counsel obtained a professional analysis of the original December 5, 2002, tape recording, or impeached F.B.I. Agent Deterding using earlier drafts of the transcripts which had been prepared, the jury could have been shown that

the portion of the transcript referring to “his address and all his rats” actually was “his address and the other rats” and concerned lawyer Amend, not Judge Lefkow.

As to the failure to impeach Agent Deterding, Hale is referring to the fact that a working draft transcript prepared prior to trial, as the tapes were being reviewed and transcripts prepared, transcribed the disputed portion as Evola saying to Hale “you wanting his address and all his rats’,” while the final transcript used at trial, which defense counsel agreed to, read “you wanting his address and the other rats.” Hale has steadfastly maintained starting with his post-verdict motions that this is a critical difference. Hale’s argument that it was an error not to have the tape professionally analyzed goes to the assertion he has made all along that the change in the transcript suggests that the tape recording was physically altered and/or tampered with.

(1:03CR11 DE #219.)

If defense counsel had “impeached” Agent Deterding with the draft transcript, the court would agree that it can be presumed that the jury would have listened to this portion of the recording more carefully. But even if the jury decided that Evola said “all his” and not “the other,” the court does not now – and has never – agreed with Hale’s argument that this dramatically changes the meaning of the conversation, so that the jury would have understood the “rat” being discussed to be lawyer Amend, and not Judge Lefkow. The court incorporates here its discussion of this issue from above, and its explanation in prior orders, in particular from 1:03CR11 DE #250-1 at 4-5.

This remains true whether the “it,” in Evola’s question, “when we get it, we gonna exterminate the rat?” meant Judge Lefkow’s address, as the court previously assumed (1:03CR11 DE #250-1 at 4), or referred to the addresses of Judge Lefkow and all of the attorneys involved in the litigation in her court, as Hale contends. Either way, the “rat” to be exterminated could have meant Judge Lefkow. No matter how the language at issue is heard, the monumental difference Hale ascribes to it simply does not exist. Therefore, his defense counsel did not fall below a minimum standard of competence by failing to obtain professional analysis of the recording, or failing to impeach Agent Deterding with the draft transcripts.

*g. “Defense Counsel Rendered Mr. Hale Ineffective Assistance” [Hale’s II.B.1.g]*

This section of Hale’s brief simply recapitulates everything argued previously, that is, that Hale’s defense counsel failed to understand and utilize the best defense, and failed to present evidence and witnesses that would have supported that defense. As nothing more than a recapitulation, the analysis above is sufficient to address this portion of Hale’s memorandum. Moreover, it should be pointed out, once again, that defense counsel’s failure to use an alternative defense which Hale now – or even at the time of his trial – believed superior to the defense that was presented does not show that Hale received ineffective assistance. Only if that decision was one that no competent attorney would have made, and only if that mistake caused Hale prejudice, did Hale receive ineffective assistance of counsel. The analysis above shows that is not the case.

2. “Failure to Fully Investigate and Failure to Present Exculpatory Witnesses and Information” [Hale’s II.B.2]

Ineffective assistance claims based on alleged failures to conduct a thorough investigation, or to present exculpatory testimony have a common element: the movant must show what would have been supplied by the missing information, that is, what a supposedly proper investigation would have uncovered, or what the uncalled witnesses’ testimony and information would have been. *See Williams v. Washington*, 59 F.3d 673, 684 (7th Cir. 1995) (“failure to investigate cannot be used as a substitute for proof of prejudice”). There must be a reasonable probability that the testimony that would have been given by the uncalled witnesses would have produced a different result. *Galowski v. Murphy*, 891 F.2d 629, 638 (7th Cir. 1989). Hale’s allegations in this regard, and affidavits from uncalled witnesses, are not sufficient to raise issues that cast doubt on the result and require an evidentiary hearing.

a. “Failure to Have the Dec. 5, 2002 Tape Professionally Analyzed” [Hale’s II.B.2.a]

Hale’s argument on this issue consists of one sentence:

Counsel failed to have the Dec. 5, 2002 recording of the conversation between Mr. Hale and Evola professionally analyzed even though the government’s original transcript confirmed that the “rat,” “Jew rat” whom Evola proposed exterminating was an attorney and *not* Judge Lefkow (the attorneys were the “rats” (“all his rats’ ”), not Judge Lefkow).

(DE #18 at 22.) Despite the skeletal nature of this argument, the court knows from Hale’s argument as a whole, as well as from his earlier filings in this case, that what he means is that a professional analysis would reveal that the tape recording has actually

been tampered with, to change the words on it, or at least that the transcript used at trial was incorrect. (1:03CR11 DE #219.)

First, as has been explained herein and in prior orders, not only does the context of the entire conversation make Hale's version of the conversation and claim that it has been altered seem unlikely, even if the conversation was exactly as he would have it, that makes little, if any, difference. (1:03CR11 DE #250-1.) But more importantly for present purposes, during the time of Hale's direct appeal through the denial of his petition for *certiorari*, and the entire year thereafter spent preparing his § 2255 motion, the tape recording has been available to him for analysis. (see 1:03CR11 DE #244 at 4 n. 6 (ordering preservation of original tape for future testing and analysis); 1:03CR11 DE #245 at 3 ("I [Hale] certify in advance that my family has offered to pay for such an analysis.")). Nevertheless, Hale has never requested that the court order the tape to be delivered to an expert for analysis. He cannot base an ineffective of assistance of counsel claim on nothing more than his speculation that an analysis of the tape would have revealed an alteration.

*b. "Failure to Call Exculpatory Witnesses Peterson, Moudry, Attorney Greenwald, Robertazzo, Logsdon, Powers, Attorney Reardon and Russell Hale, Jr." [Hale's II.B.2.b]*

Hale presents affidavits from these witnesses (with the exception of Shawn Powers) containing the key aspects of what he believes would have been their exculpatory testimony, and summarizes that testimony in his brief. Without repeating that summary testimony here, the gist of it is that the witnesses would have related

statements Hale made to them showing that he wanted Judge Lefkow's address only so that a peaceful protest could be held outside her home; that he was working on motions to be filed in the trademark case pending before Judge Lefkow; that Hale intended that his church's reaction to Judge Lefkow's order in the trademark case would be entirely peaceful, and that Hale had been using the term "Jew rat" to refer to lawyer Amend. This testimony, Hale asserts, would have shown that his state of mind was inconsistent with having an intent to have Judge Lefkow murdered. In addition, in his recently-filed supplement (DE #48), Hale indicates that two of the witnesses, Petersen and Robertazzo, would have supported Hale's claim that he suspected, long before the events leading to the charges, that Evola was a government informant, and he therefore would not have solicited Evola to murder Judge Lefkow.

As the government points out in its response, the substance of nearly all of these points were effectively made at trial using other evidence.<sup>20</sup> For example, recordings were introduced into evidence, and played for the jury, in which the jury heard Hale himself state that it was his intention to follow the law, and that the Church was peaceful and non-violent; during cross-examination of the government's witnesses, defense counsel obtained admissions that Hale was seeking Judge Lefkow's address to conduct a demonstration at her home, and that point was emphasized during closing.

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<sup>20</sup> This is not true regarding the purported testimony of Hale's father that Hale had told him, on the night of December 17, 2002, that Evola "wanted [him] to do something wrong." Because of the obvious bias inherent in his father's testimony, it is not at all likely that Hale suffered prejudice from counsel's decision not to call him.

Attorneys are not ineffective when they fail to present evidence which is merely cumulative. *United States v. Jackson*, 935 F.2d 832, 845-46 (7th Cir. 1991).

This is even more true when, as here, putting those witnesses before the jury presents other dangers. The government points out that had Todd Reardon, the attorney for the Church in the trademark litigation, been called, he would have had to concede that Hale was intimately familiar with the details of the litigation, bolstering the government's case on Count 1, charging Hale with obstructing justice by sending the judge presiding over the case a letter containing a false statement. As to Kathleen Robertazzo, besides issues with her credibility, her testimony that Hale had sent a scathing e-mail to a Church member who had posted violent rhetoric on the Church's website would have been compared unfavorably by the government to the fact that Hale never similarly chastised Evola, only heightening the seriousness of their conversations.

Hale also argues that witnesses Petersen and Robertazzo would corroborate what Hale told the FBI shortly after he was arrested—that he had suspected for a long time that Evola was a government informant—by stating Hale had told them that same information long before his arrest. The jury did hear evidence that after his arrest, Hale had written a letter (admitted at trial as Gov. Ex. 12) to another WCOTC leader, Jon Fox, reminding Fox to “remember” that Hale had stated in the past that Evola was an informant; but at trial, Fox testified that Hale had not said that, and the letter was a request for him to lie. (Tr. Vol. 6 at 66-67.) Hale argues that Petersen and Robertazzo

would corroborate that he had, in fact, always expressed doubts about Evola, which would prove that he never would have solicited Evola to commit Judge Lefkow's murder.

Of course, not only might the jury have wondered why Hale would have placed a suspected informant in charge of the "White Berets," the supposed elite security force for the WCOTC, this would also be inconsistent with the crux of the defense Hale believes should have been pursued, that he thought that he and Evola *were* discussing the murder of lawyer James Amend. But putting this logical inconsistency aside, the affidavit provided by Robertazzo doesn't say Hale told her that he thought that Evola was an informant, it states that she told Hale she thought that was the case. (DE #8-3 at 38 ¶ 16.) But assuming that she would testify that Hale agreed with her – and Petersen's affidavit does say that Hale told him Evola was a suspected informant (DE #8-3 at 31 ¶ 16) – both Robertazzo and Petersen are sympathetic to Hale and the WCOTC. Petersen was the leader of the WCOTC for the state of Wisconsin; Robertazzo has had extensive e-mail correspondence with Hale because she is "attracted . . . to Matthew and his civil rights movement." (DE 8-3 at 29 ¶ 2; 36 ¶¶ 4-5.)

Considering the bias of these witnesses in Hale's favor, and all the other evidence of Hale's interactions with Evola, the court does not believe that calling these witnesses would have had any impact on the jury. Decisions whether or not to call particular witnesses are generally unreviewable matters of strategy, *United States v. Best*, 426 F.3d 937, 945 (7th Cir. 2005), and here, in addition, the court does not believe any prejudice

resulted. Hale's argument that his counsel was ineffective for failing to call a number of witnesses whose affidavits have been provided and testimony summarized is not persuasive.

*c. "Failure to Present Evidence on Mr. Hale's Lack of Predisposition" [Hale's II.B.2.c]*

Hale argues that his attorney failed to introduce evidence that would have supported his entrapment defense, that is, the testimony of the witnesses above that he was peaceful and law-abiding. For the reasons already discussed, this did not cause prejudice. In addition, Hale argues that counsel failed to impeach Evola by showing that Hale had condemned violence in Evola's presence, such as by remarking that he wished that Benjamin Smith had shot him (Hale) in the leg instead of carrying out his multi-state murder spree.<sup>21</sup> Hale does not show how this evidence would have been established, if Evola denied the conversations, without he himself testifying, which right he waived. Therefore, again, Hale has failed to establish either a sub-par performance by his attorney or any resulting prejudice.

*d. "Failure to Offer Exculpatory Documents, Recordings and Testimony"*  
*[Hale's II.B.2.d]*

Hale argues that his attorney failed to present evidence (much of it in the form of testimony by the witnesses discussed above) that would have shown that the "state of war" declared against Judge Lefkowitz was a legal and non-violent "war" that had nothing to do with violence. Besides the fact that such evidence would have done little

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<sup>21</sup> Hale does not cite a recorded conversation containing this statement.

or nothing to change or illuminate the meaning of the key conversations between Hale and Evola, the jury did hear evidence of this nature. For example, government witness Burnett stated during cross examination that his understanding of the term "RAHOWA" – a reference Hale often used meaning "racial holy war" – gleaned from his time with Hale was that it meant "a mental holy" not a "holy war of violence." (Tr. Vol. 5 p. 29.) The jury also heard evidence of numerous statements by Hale such as "all we can do at this point is be legal and be peaceful and follow the rules. That's all we can do because, you know, if we weren't to do that then, it would be even worse[.]" (Gov. Ex. 12/3/00 at 2.) Hale's attorney's performance in this regard was not deficient.

*e. "Failure to Interview Witnesses John Schlismann and James Burnett"*  
*[Hale's II.B.2.e]*

Hale argues that his attorney was ineffective for failing to interview, or call as a witness, John Schlismann, who would have testified that Hale and Evola both referred to lawyer Amend as a "Jew rat," and failed to interview government witness Burnett, which might have allowed the defense to learn that the government coerced Burnett into giving false testimony, or so Hale now alleges.

The failure to interview Schlismann, or present his testimony, was of no consequence. As has been explained herein and in multiple prior orders in this case, the jury heard right from the mouth of informant Evola that the term rat was frequently used to refer to all perceived enemies of the Church. In his own affidavit in support of his motion, Hale points out that his attorney, during cross-examination of Evola,

obtained Evola's admission that "Jew rat" was a term that "couldn't be just limited to one person," that "rat" was frequently "used for traitors or somebody who was against the church," and that Amend was considered to be a traitor. (Tr. Vol. 9 at 75-76.) With this admission from the government's own informant, it was unnecessary to offer another witness to make the same point.

As to Burnett, the only evidence that the government coerced Burnett into giving false testimony is in an affidavit provided by David Hale, presumably defendant's brother,<sup>22</sup> in which he describes an incident that occurred post-trial in which he ran into Burnett in a bar in East Peoria, and a "teary eyed" Burnett told him that he (Burnett) was afraid that Hale's father might be mad at Burnett for testifying at trial, and that the government had placed him in handcuffs and told him what to say when he testified. The reasons why Burnett, a former ally of Hale, might want to absolve himself of responsibility in a bar-room conversation with Hale's brother, are obvious. Without some present corroboration from Burnett himself, this is simply not sufficient to create a question that Hale's attorney was ineffective for not interviewing Burnett prior to trial.

*f. "Failure to Offer Mr. Hale's Exculpatory Testimony" [Hale's II.B.2.f]*

At trial the government compared Hale's having provided Evola with Judge Lefkow's address to a previous occasion when Hale had provided another individual's (Ken Dippold) address to Evola, in order for Evola to murder him. Hale states that he had informed his attorney prior to trial that Dippold's address had been provided to

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<sup>22</sup> See DE #8-3 at 6 ¶ 7.

Evola only for a peaceful purpose, in response to Evola's request to complete his files which contained the addresses of all church members. He argues that his attorney was ineffective for not having him testify to this at trial, or at least for not impeaching Evola by asking him whether that were the case. As to the first point, again, Hale waived his right to testify at trial, and the validity of that waiver will be discussed further herein. As to the second point, it is unknown whether Evola would have agreed that he asked Hale for the information. In addition, although the comparison to Hale having provided Dippold's address was important to the government's case, it was not critical: the recorded conversations between Hale and Evola concerning Judge Lefkow are damning by themselves. For these reasons, Hale cannot show prejudice resulted from his attorney's failure to attempt to impeach Evola by inquiry into this matter.

*g. "Failure to Rebut Government Evidence" [Hale's II.B.2.g]*

Hale argues that although the jury heard evidence of comments he made concerning the Ben Smith shooting spree, suggesting he had a violent predisposition, his attorney did not put into evidence the many comments he had made condemning Smith's crimes and violence in general. This proposed evidence is sprinkled throughout the various affidavits Hale has attached in support of his motion. For example, in the affidavit provided by his father, Russell Hale, Mr. Hale states: "Matthew, since the shooting spree ended, has denounced on multiple occasions what Smith did." (DE #8-3 at 18 ¶ 9.) As already noted above, it is unlikely that testimony from Hale's own father would have had much impact on the jury. Moreover, as has already been mentioned

herein, the jury did hear ample evidence, much of it consisting of defendant Hale's own statements, of him denouncing violence and stating that the WCOTC would use peaceful means to achieve its objectives. His attorney's failure to offer cumulative evidence on this point, from Hale's father, did not cause prejudice.

Moreover, some of the proposed testimony is not even as favorable to Hale as he suggests. For example, Brian Moudry states in his affidavit that regarding Ben Smith, "although Reverend Hale sympathized with some of his feelings, he did not believe that Ben Smith's actions did our movement any good and, in fact, believed that it set us back in the public eye." (DE #8-3 at 27 ¶ 11.) Christopher Lee Peterson states in his affidavit that Hale told him that Smith's actions were "a blow to the reputation of our Church," and that "the Church's position on the shootings was that we condemn Ben Smith's violent acts, but not Ben Smith personally," (DE #8-3 at 30 ¶¶ 7-8), begging the question why a peaceful and non-violent person wouldn't condemn someone who had gone on a murder rampage. In both cases, the implication is that Hale did not disagree with Smith's actions because of his own peaceful and non-violent nature, but only for the practical reason that he did not view Smith's actions as advancing the WCOTC's interests. Thus, this testimony would have done little, if anything, to convince the jury that Hale was truly opposed to violence.

As explained above, Hale's attorney did offer other evidence of statements Hale had made condemning violence and explaining that the Church would work using peaceful methods. Particularly in light of how unpersuasive the additional evidence

Hale identifies is, his attorney was not ineffective for choosing to use the witnesses and evidence he did, and not offering this cumulative evidence of Hale's disposition and alleged comments regarding the Smith shooting.

*h. "Defense Counsel's Representation was Deficient and Prejudicial" [Hale's II.B.2.h]*

This section of Hale's memorandum simply reiterates and summarizes all of the points previously raised (and discussed above), concluding that his attorney failed to thoroughly investigate and understand the case, and so failed to use the available evidence to present the "best" defense; that is, showing that Hale had neither the predisposition nor intent to solicit Judge Lefkow's murder, and he rejected Evola's proposal to do so. For all of the reasons discussed above, the court disagrees with the particulars of this argument, disagrees that this strategic course would have been Hale's "best" defense, and, moreover, even if it were, disagrees that his attorney was ineffective for choosing to use an alternative defense. The decision as to what defense is "best" is subjective and a matter of strategy, and counsel is ineffective only if the defense actually utilized was so deficient that no attorney acting in a professionally competent manner would have done so. The court believes that the discussion above shows why that is obviously not true here.

*3. "Failure to File a Meritorious Motion to Suppress" [Hale's II.B.3]*

Hale argues that his attorney was ineffective for failing to file a motion to suppress evidence that was seized from Hale's residence, which also served as the "world headquarters" for the WCOTC. As Hale forthrightly explains, to establish a

claim of ineffective assistance based on this argument, he must show both that the motion to suppress would have been meritorious, and that had the evidence been suppressed, there is a reasonable likelihood a different verdict would have been reached. *United States v. Cieslowski*, 410 F.3d 353, 360 (7th Cir. 2005); *Owens v. United States*, 387 F.3d 607, 610 (7th Cir. 2004).

First, in subsection (a) of this portion of his brief, Hale argues that the search warrant was invalid on its face because it did not state that there was probable cause to believe that a crime had been committed, nor did it specify any statute which there was probable cause to believe had been violated. Although the warrant stated that the issuing judicial officer found that the affidavit in support of the application for the warrant “establish[ed] grounds for the issuance” of the warrant, and that affidavit did specify the alleged statutory violations which evidence was sought in connection with, Hale argues this does not remedy the warrant’s invalidity, because the warrant did not incorporate the application and affidavit by reference.

Taking this last point first, the Court of Appeals has held that an application and affidavit supporting a search warrant can supply the needed particularity, even when not attached to or incorporated by reference, when the issuing magistrate considered the affidavit and the executing officers complied with its terms, which has not been questioned here.<sup>23</sup> *United States v. Jones*, 54 F.3d 1285, 1290-92 (7th Cir. 1995); see *United*

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<sup>23</sup> No doubt, Hale argues that the terms of the warrant were too broad. What the court means here is only that Hale’s argument that the warrant itself was facially invalid is incorrect.

*States v. Dennis*, 115 F.3d 524, 529 (7th Cir. 1997). Clearly, the affidavit submitted in support of the application for the search warrant was considered, because it was sworn to before Magistrate Judge Gorman, who then issued the warrant. (DE #36-2 at 44.) Last, the affidavit was submitted by Agent Coughenour, to whom the warrant was then issued for execution (DE #36-2 at 3), and that weighs strongly against applying the exclusionary rule simply because the warrant itself may have been lacking in particularity. *United States v. Stefonek*, 179 F.3d 1030, 1034 (7th Cir. 1999).

As to Hale's main point, that the warrant was facially invalid because it itself did not specify a crime, or state that probable cause existed to believe that evidence of the unspecified crime would be found, Rule 41(e) of the Federal Rules of Criminal Procedure imposes no such requirements on a warrant. Instead, Rule 41(e) requires only that the warrant "must identify the person or property to be searched, identify any person or property to be seized, and designate the magistrate judge to whom it must be returned."<sup>24</sup> Fed. R. Crim. P. 41(e)(2)(A).

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<sup>24</sup> In addition the warrant must command execution within a time period not longer than 14 days, during the daytime (unless execution at another time is authorized for good cause shown), with return to the magistrate judge designated therein. Fed. R. Crim. P. 41(e)(2)(A)(i)-(iii).

Hale has cited no authority<sup>25</sup> for the requirement which he contends exists, and it is particularly appropriate to note that Rule 41 was amended in 1972 to eliminate any such requirement. As explained in the Advisory Committee Notes:

The requirement that the warrant itself state the grounds for its issuance and the names of any affiants, is eliminated as unnecessary paper work. There is no comparable requirement for an arrest warrant in rule 4. A person who wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued.

Thus, the warrant was not facially invalid for failing to specify the statute(s) Hale had allegedly violated.

In subsection (b), Hale argues that a motion to suppress would have been meritorious because the warrant issued didn't describe the items to be seized with sufficient particularity, and in subsection (c) that it was not issued based on probable cause because the application and affidavit failed to establish a nexus between the items to be seized and the crimes alleged. Hale's particularity argument is that the warrant

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<sup>25</sup> To be fair, in his reply brief Hale does cite *United States v. Bridges*, 344 F.3d 1010, 1016 (9th Cir. 2003), as a case holding that where a search warrant used "expansive and open-ended language," its failure to specify what criminal activity was being investigated rendered it constitutionally invalid. However, *Bridges* also states that the "Fourth Amendment requires search warrants to state with reasonable particularity what items are being targeted for search or, *alternatively*, what criminal activity is suspected of having been perpetrated. *Id.* at 1017 (emphasis added). Thus, the case does not stand for the proposition that failure to specify the crime in the warrant renders the warrant *facially* invalid, which is Hale's contention. Moreover, *Bridges* is a Ninth Circuit case which has never been cited by the Court of Appeals in this circuit, and appears to differ from Seventh Circuit precedent. As already noted, in this circuit an affidavit submitted in support of a search warrant can supply the necessary particularity, even when not incorporated or attached to the warrant. *See Jones*, 54 F.3d at 1290-92.

was overbroad, because by authorizing, without a limiting time period, the seizure of all “computers and computer related equipment,” “newsletters, mailing lists, phone logs, address books, phone records that contain information regarding potential co-conspirators,” and “documents and records pertaining to the WCOTC,” the “agents were given ‘carte blanche’ to seize everything they saw.” (DE #18 at 33.) In addition, the warrant (in Attachment A) authorized seizure of “letterhead, labels, signs prints [sic] packages, and books that contain the term ‘Church of the Creator,’” and Hale argues that because this implicates rights under the First Amendment, the warrant had to list the items to be seized with “scrupulous exactitude.”<sup>26</sup> See *United States v. Hall*, 142 F.3d 988, 996 (7th Cir. 1998) (increased particularity necessary for items presumptively protected by First Amendment).

Hale’s nexus argument cites *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967) for the principle that “[t]here must, of course, be a nexus . . . between the

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<sup>26</sup> Hale cites the dissenting opinion in *Nixon v. Admin. of Gen’l Serv.*, 433 U.S. 425, 530 (1977), as the authority for the “scrupulous exactitude” standard. But *Nixon* quotes *Stanford v. Texas*, 379 U.S. 476, 485 (1965), and *Stanford* applied that standard when the things to be seized “are books, and the basis for their seizure is the ideas which they contain.” *Id.* (Emphasis added.) In the present case the basis for the seizure of these items was not the ideas contained therein, but because of the trademark-infringing term “Church of the Creator.” See *TE-TA-MA Truth Foundation-Family of URI, Inc. v. World Church of the Creator*, 297 F.3d 662 (7th Cir. 2002). Thus, Hale relies on a standard that is inapplicable under the circumstances. See *Hall*, 142 F.3d at 996 (scrupulous exactitude required when basis for seizure is ideas contained in the items to be seized).

item to be seized and criminal behavior.”<sup>27</sup> Hale then argues that a nexus didn’t exist between the crimes for which probable cause may have existed and the items subject to seizure, mentioning the same categories as above, with particular emphasis that “there was no probable cause that *anything* listed in *Attachment A* regarding ‘computers’ or ‘documents and records pertaining to the WCOTC’ were connected with the criminal activity alleged in the A.A.S.W.” (DE #18 at 34.)

Hale’s nexus argument is somewhat misleading, however, in that his quotation from *Warden, Maryland Penitentiary*, is not the holding of the case, and the case did not even involve a warrant: the question before the Court was whether items had been properly seized during a warrantless search. The Court abandoned the distinction between “mere evidence” and fruits of a crime, holding that it is reasonable, under the Fourth Amendment, to seize “mere evidence,” and not just fruits, instrumentalities or contraband. *Id.* at 310. The comment on which Hale relies came in the context of the Court’s observation that a nexus, supplying probable cause for seizure, automatically exists when the items seized are fruits, instrumentalities or contraband, but when “mere evidence” is sought, “probable cause must be examined in terms of cause to believe that the evidence sought will aid in a particular apprehension or conviction.” *Id.* at 307.

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<sup>27</sup> As explained in the accompanying text, this statement is not the holding of *Warden, Maryland Penitentiary*, which in fact is a case involving a *warrantless* search. However, the court accepts that the nexus requirement Hale proposes is required for Fourth Amendment reasonableness.

Thus, in the court's view, Hale's discussion of the lack of a "nexus" between the crimes of which Hale was suspected is simply an aspect of his argument that the warrant was a general warrant lacking in particularity:<sup>28</sup> because, in his view, it authorized the seizure of anything and everything, there is no connection between the items to be seized and criminal activity. Because it is a part of his particularity argument, the court considers his arguments on particularity and nexus/probable cause together in the following paragraphs.

First, as to the computers and computer-related equipment, the affidavit in support of the search warrant described how Hale had used computers at that location to communicate with Evola and other members of the Church, and in particular, to solicit information concerning Judge Lefkow and the attorneys involved in the trademark litigation against the WCOTC that she was presiding over, to declare that orders entered by the Judge caused a state of war to exist between her and the WCOTC, and to encourage members of the WCOTC to resist the "Jewish Occupational

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<sup>28</sup> All of the Seventh Circuit cases this court has found which discuss "nexus" as a discrete requirement for a search warrant do so in the context of the question whether there is a belief that the property sought will be at the location to be searched, that is, a physical nexus sufficient to create probable cause for the search. *See e.g., United States v. Hobbs*, 509 F.3d 353, 361 (7th Cir. 2007). This is consistent with the common phrasing that: "A warrant application must demonstrate probable cause to believe that (1) a crime has been committed-the 'commission' element, and (2) enumerated evidence of the offense will be found at the place to be searched-the so-called 'nexus' element. With regard to the 'nexus' element, the task of a magistrate in determining whether probable cause exists is "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *See United States v. Feliz*, 182 F.3d 82, 86 (1st Cir. 1999) (citations omitted).

government” by treating its members “like the criminal dogs they are and take the law into our own hands.” (DE #36-2 at 16-17.)<sup>29</sup> After an introductory paragraph stating that the residence to be searched was “often used by Hale to conduct WCOTC business. This includes using the computer located at the residence to access the internet, and e-mail WCOTC literature and propaganda,” (DE #36-2 at 14 ¶ 10), the affidavit detailed many of the communications Hale had made using e-mail, such as those just described.

Thus, as the government argues, it was not overly-broad to authorize seizure of computers and computer-related equipment. Any such equipment could have contained electronic data that might be evidence, and a warrant only needs to identify the items to be seized “as precisely as the circumstances and the nature of the alleged crime permit.” *United States v. Vitek Supply Corp.*, 144 F.3d 476, 481 (7th Cir. 1998). Thus, the warrant was not impermissibly broad in this regard, and clearly there is an evidentiary nexus between these items and the crimes which were alleged. *See United States v. Pritchard*, 745 F.2d 1112, 1121 (7th Cir. 1984) (warrant authorized seizure of wiretapping equipment including devices resembling telephone receivers, and agents seized every portable electronic item in the residence); *see also United States v. Summage*, 481 F.3d 1075, 1079 (8th Cir. 2007) (warrant authorizing seizure of all video tapes and DVDs, all video and digital recording devices and equipment, all equipment used to

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<sup>29</sup> Hale of course maintains to this day that the term “war” was used in a metaphorical sense only, and it was to be a peaceful war conducted legally in the courtroom and outside through picketing, protesting and the dissemination of information. Whether that is what Hale meant was a factual question which the jury clearly decided against him.

develop and upload or download photographs and movies, and all computers, not overbroad when agents did not know precisely what format the evidence might be kept in); *United States v. Hill*, 459 F.3d 966, 974-75 (9th Cir. 2006) (on-site search of a computer “could take many hours and perhaps days” and “would not only impose a significant and unjustified burden on police resources, it would also make the search more intrusive”); *United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999) (“As a practical matter, the seizure and subsequent off-premises search of the computer and all available disks was about the narrowest definable search and seizure reasonably likely to obtain the images.”)

As to “documents and records pertaining to the WCOTC,” and “letterhead, labels, signs prints [sic] packages, and books that contain the term ‘Church of the Creator’” the latter being the category Hale argues is governed by a “scrupulous exactitude” standard, first, even if that standard applies – as to which the court has doubts, see n. 25, *supra* at 40 – it was met. By specifying that the items had to contain the term “Church of the Creator” the warrant limited seizure to items that contained an infringing mark. This identifies the items to be seized with the necessary exactitude, because the officers executing the warrant did not need to exercise discretion to determine whether an item should be seized. See *Hall*, 142 F.3d at 996. In addition, because the items contained the infringing mark, they lost their First Amendment protection. See *TE-TA-MA Truth Foundation-Family of URI, Inc.*, 297 F.3d at 667.

Regarding the first category, “documents and records pertaining to the WCOTC,” Hale’s argument is that the warrant was too broad because it:

allowed the agents to seize everything the Church possessed. The F.B.I. clearly treated the warrant as a general warrant, and, accordingly, seized everything that the Church had, including the Church’s flag.

Hale never explains precisely why the seizure of everything that the Church possessed is, necessarily, too broad.<sup>30</sup> For example, he expresses incredulity that agents seized the WCOTC’s flag, but if that flag contained the trademark-infringing term “Church of the Creator,” it put Hale in violation of orders entered in the case, and exposed Hale to a finding of contempt. Thus, the flag, and all items containing the mark, were potentially relevant to Hale’s motive to interfere or impede Judge Lefkow’s administration of the case, supplying the nexus that Hale believes was absent.<sup>31</sup> The affidavit submitted in support of the search warrant alleged that the items sought would link Hale to the crime of threatening to assault or murder a federal judge “with intent to retaliate (DE #36-2 at 11 ¶ 4, and intent to retaliate is an element of 18 U.S.C. § 115.

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<sup>30</sup> As an aside, Hale hasn’t asserted that he was a person who had standing to object to a possibly illegal seizure of property belonging to the WCOTC. The court assumes, however, that Hale had a privacy interest in the location where the property was kept, giving him that standing.

<sup>31</sup> In his reply memorandum, Hale argues that the warrant’s authorization to seize any item containing the term “Church of the Creator” was too broad because Judge Lefkow’s orders did not prohibit the WCOTC from possessing items containing that term, only items where that term was used as a trademark. Without expressing any opinion as to whether this distinction holds any water, the court notes only that it would be unreasonable to expect officers in the field executing the warrant to make a judgment whether the term was being used as a mark or “only as a term.”

The purpose of the Fourth Amendment's particularity requirement is to ensure that an individual's property and privacy interests aren't invaded more than is necessary to achieve a valid law enforcement purpose. *Stefonek*, 179 F.3d at 1033. Only reasonable specificity is required, and identifying items by categories is sufficient to circumscribe the discretion of the executing officers. *United States v. Shoffner*, 826 F.2d 619, 632 (7th Cir. 1987). "A search warrant does not have to specify the precise documents sought (often an impossible task) in order to satisfy the Fourth Amendment." *United States v. Vanichromanee*, 742 F.2d 340, 347 (7th Cir. 1984). "Documents and records pertaining to the WCOTC" were potentially relevant to Hale's motive, by showing, whether or not, as he claimed, he was no longer directing the activities of the WCOTC and that its headquarters had been moved to Wyoming, and determining the identities of WCOTC members Hale had solicited to resist Judge Lefkow. As with the seizure of all computers and computer-related equipment, taking the time in Hale's residence to comb through these documents and records would have been more, not less, intrusive, of Hale's privacy, and the seizure of all such WCOTC records was not so broad as to fail the particularity requirement of the Fourth Amendment.

In its response the government does admit that one category of items to be seized — "newsletters, mailing lists, phone logs, address books, phone records that contain information regarding potential co-conspirators" — was not very specific. This was because, as Hale has pointedly noted, the warrant itself did not identify the

particular criminal statute allegedly being violated, leaving the meaning of the term “co-conspirator” unclear. The government argues, however, that the meaning of “co-conspirator” was defined by the context of that paragraph of the warrant, specifying that what was sought was “communications with other individuals associated with white supremacists [sic] groups relating to or discussing criminal activity and violence against others.” (DE #36-2 at 4.) The court agrees that this context prevents the warrant from being overbroad. “The particularity requirement of the Fourth Amendment is to be applied with a practical measure of flexibility.” *Shoffner*, 826 F.2d at 631.

Finally, even if the court’s view now that the warrant was not overbroad is misguided, a motion to suppress the evidence which was seized pursuant to its execution would, nevertheless, have been unsuccessful because of the good-faith exception established in *United States v. Leon*, 468 U.S. 897 (1984). Under *Leon*, even if probable cause for issuance of the warrant was not established, evidence seized pursuant to the warrant will not be suppressed if the police relied in good faith on the warrant. *Id.* at 920-21. The decision to seek and obtain a warrant is itself *prima facie* evidence that the police acted in good faith. *United States v. Dismuke*, 593 F.3d 582, 586 (7th Cir. 2010). Therefore, the exception “applies unless the affidavit was ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable’ or the warrant-issuing judge ‘wholly abandoned’ his neutral judicial role and ‘serve [d] merely as a rubber stamp for the police.’” *Id.* (quoting *Leon*, 468 U.S. at 923).

Hale argues that the *Leon* exception does not apply because: 1) the warrant's facial invalidity (its failure to specify a crime) was so apparent that no reasonable officer could have relied on it; and/or 2) the affidavit submitted to obtain the search warrant was so lacking in probable cause that no reasonable officer could have relied on it. *See United States v. Mykytiuk*, 402 F.3d 773, 777 (7th Cir. 2005). As to the first of Hale's two alternatives, the court has explained above that a warrant is not facially invalid simply because it does not specify the criminal violation which is suspected. Thus, because the warrant was not facially invalid, Hale's first alternative does not show a lack of good faith by the executing officers.

As to his second alternative, Hale explains:

[E]ven though the government repeatedly defends the warrant by saying how it wanted or needed every document the WCOTC possessed (*e.g.*, "documents and records pertaining to the WCOTC") apparently out of some kind of belief that it should enforce Judge Lefkow's civil court order by use of a criminal search warrant, *the probable cause upon which the warrant was based had nothing to do with anything other than a supposed plot against Judge Lefkow's life*. Thus Agent Coughenour's own affidavit was lacking in probable cause since the general inventory of the Church's possessions certainly did not constitute evidence of a plot against Judge Lefkow's life. Thus, no reasonable officer could have relied upon it.

(DE #36 at 10-11.) This argument presents, of course, a conundrum. If the WCOTC documents and records seized did not contain relevant "evidence of a plot against Judge Lefkow's life" that was useful at trial, the failure to seek suppression of that evidence would cause no prejudice, and so could not be the basis for an ineffective

assistance of counsel argument. Rather than delving into this riddle, this court states only that it believes, as explained above, that evidence that Hale was maintaining property which violated Judge Lefkow's order was potentially relevant to his motive: relevant enough, in the very least, so that reasonable officers executing the warrant would not lack good faith in believing that the affidavit supplied probable cause to seize the items as evidence.

In summary, for all of the reasons explained above, the court does not believe that Hale can establish that a motion to suppress evidence would have been meritorious. Therefore, his defense counsel's failure to file that motion was not ineffective assistance because it caused no prejudice, and it is unnecessary to address part (d) of Hale's argument, asserting that suppression of the evidence likely would have produced a different verdict.

4. *"Trial Errors"* [Hale's II.B.4]

In subpart (a) of this argument, Hale asserts that his attorney was ineffective for failing to object to the admission of the Court of Appeals' opinion reversing Judge Lefkow's decision in the civil trademark litigation; for failing to object to a line of questioning based on a portion of that opinion; and for failing to request a limiting instruction relating to that line of questioning. Specifically, the opinion contained a parenthetical statement that a change in the name and structure of the WCOTC was

“part of a judgment-proofing strategy after a court held in 1994 that Klassen’s<sup>[32]</sup> organization must pay damages for orchestrating a murder.” *TE-TA-MA Truth Foundation-Family of URI, Inc.*, 297 F.3d at 664; DE #18 at 37.) Hale argues that this allowed an unfairly prejudicial inference that Hale’s church had a habit of soliciting murders, which was then exacerbated by the government’s line of questioning related to judgment-proofing, conflating the two entities and implying that Hale’s WCOTC had “sponsored,” a murder; and by defense counsel’s failure to request a limiting instruction that the acts of Klassen’s organization could not be considered against Hale.

As the government has pointed out in its response, defense counsel did object to the use of the opinion during trial. (Tr. Vol. 4 at 113-116.) The decision not to request a limiting instruction, which would also have had the effect of emphasizing the objectionable portion of the opinion, was clearly a strategic decision which this court will not second-guess in the guise of ineffective assistance of counsel. *United States v. Gregory*, 74 F.3d 819, 823 (7th Cir. 1996) (if lawyer cannot stop admission of evidence, “it is perfectly rational to decide not to draw further attention to it” by requesting a limiting instruction).

As trial error (b), Hale argues that his defense counsel introduced into evidence, and read extensively from, the WCOTC’s two “bibles,” which contain prejudicial and

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<sup>32</sup> Ben Klassen was the founder of the Church of the Creator, Inc., a forerunner organization to the WCOTC. It should be noted, significant to Hale’s argument here, that the parenthetical statement continued: “Klassen committed suicide in 1993, and Matt Hale became “Pontifex Maximus” of the reconstituted organization in 1996.” Thus, the opinion itself created a distinction between the two entities.

inflammatory terms and passages, some of which were read to the jury, such as one calling for the "Elimination of the Black Plague." (DE #18 at 37). Little more need be said than to quote the government's response to this argument:

This argument is particularly ironic because trial counsel used these writing during the cross-examination of the government's witness, Jon Fox. At the conclusion of the trial, the jury acquitted Hale of the conduct substantially premised on Jon Fox's testimony. Trial counsel's strategic decision to use these writings to impeach Fox were [sic] successful. Defendant's *post hoc* argument as to the reasonableness of trial counsel's strategy call cannot be the basis for an ineffective assistance of counsel claim.

(DE #30 at 19.) Hale's argument in reply is that "whatever extremely dubious impeachment value the books had regarding Fox was vastly outweighed by their prejudicial effect." (DE #36 at 11.)

This largely misses the point. Assessing the weight of the impeachment value of the books against Fox versus their potential to cause prejudice is exactly the type of subjective judgment that goes to the heart of strategic decision-making. Because the decision was not so misguided that no competent attorney would have made it (in fact, it may have had a decisive effect in the jury discounting Fox's testimony),<sup>33</sup> second-

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<sup>33</sup> Whether or not the impeachment value of the books was "dubious," defense counsel's impeachment strategy in regard to Fox appears to have been highly effective. In initial government interviews, Fox mentioned that he remembered when and where Hale had solicited him to commit acts of violence, because he and Hale were walking down the street at the time and a FedEx truck pulled up with a package for Hale. The government later obtained FedEx records showing a delivery had occurred when Fox said it did. Despite this corroborating detail, the jury apparently did not believe Fox's testimony.

guessing that judgment cannot be done to conclude that there was ineffective assistance. *See United States v. Farr*, 297 F.3d 651, 658 (7th Cir. 2002) (presumption of effectiveness is not overcome by Monday-morning quarterbacking of trial tactics that were rationally based).

In subpart (c), Hale argues that his attorney was ineffective for not asking for a limiting instruction on evidence concerning the Ben Smith shooting spree, despite four inquiries by the court whether one was wanted. The court also recognized, during trial, that there was a strategic reason why defense counsel might not want that limiting instruction, so as not to emphasize the evidence. (Tr. Vol. 6 at 187.) In reply, Hale argues that while that strategic decision might be appropriate if viewed “in a vacuum,” when placed in the context of other evidence the jury heard at trial (for example, the evidence discussed above that the Klassen-founded predecessor to the WCOTC had “orchestrated a murder”), the unreasonableness of the decision is obvious. Again, this is nothing more than an argument that, in hindsight, Hale disagrees with his trial counsel’s strategic decision. It does not persuade the court now that a strategic decision not to call additional attention to this evidence via a limiting instructions was objectively unreasonable.

In subpart (d), Hale argues that his attorney’s performance fell outside the wide range of professional competence when defense counsel elicited testimony from government informant Tony Evola that another person, named John Yonkers, had told Evola that Hale had solicited him (Yonkers) to “do what Ben [Smith]” had done.

Surprisingly, the government objected to this presumably damaging (to Hale) testimony on the grounds that it was hearsay and being used as an improper method to impeach Evola. (Tr. Vol. 7B at 106.) This objection was discussed at a sidebar, during which defense counsel gave a lengthy explanation of his strategy in eliciting the testimony: he intended to use it to argue to the jury that Evola had made the statement up, in order to ingratiate himself with the government and ensure his continued use as an informant, and it was part of a pattern of deliberate deception by Evola, culminating in his attempting to persuade Hale to take violent action against Judge Lefkow, rather than the other way around, as charged in the indictment. (*Id.* at 107-114.) When the court sustained the government's objection (*Id.* at 115), defense counsel had the court reporter read back exactly what Evola had said on the witness stand, and decided not to have the court strike it and tell the jury to disregard, so as not to call attention to it. (*Id.* at 116-117.)

Hale argues that his attorney's performance is comparable to defense counsel's in *White v. McAninch*, 235 F.3d 988 (6th Cir. 2000), a case involving a prosecution of White for engaging in oral sex with his underage stepdaughter. After the prosecution brought out evidence of an uncharged act of intercourse, White's defense counsel—who did not object, and never asked for a limiting instruction—adduced extensive additional details about the alleged incident, and then spent time during his closing arguing that the circumstances showed that the victim was lying. After remarking that the label “strategy” can't be used as a “blanket justification” to excuse ineffective assistance of

counsel, and that even deliberate trial tactics can be ineffective assistance when they “fall outside the wide range of professionally competent assistance,” *Id.* at 995 (internal quotations and citation omitted), the court affirmed the trial court’s finding of ineffective assistance.

There is a significant difference between defense counsel’s performance in *White* and that of Mr. Hale’s, which amounts to the difference between ineffective, and effective, representation. As the court explained in *White*:

[T]here was nothing in the record to suggest that [defense counsel] McCrae was aware of the uncharged act of sexual intercourse before the trial. Moreover, he seemed totally unaware of the fact that there were a number of witnesses who would corroborate the victim’s story. Although McCrae met with White and White’s father several times prior to trial, there is no evidence that either of these men gave McCrae any information about the uncharged act. . . . McCrae did not conduct formal discovery, and the record does not show that White’s meetings with the assistant prosecutor produced any information about the uncharged act. Finally, McCrae did not review prior to trial either the victim’s or Angela Kemper’s videotapes, both of which discussed the uncharged act.

McCrae’s woefully inadequate trial preparation renders it highly implausible that he developed his theory that the victim was lying about the uncharged act, and thus, the numerous episodes of oral sex as well, prior to trial. Indeed, a review of the trial record reveals that a much more likely scenario is that McCrae first learned of the victim’s allegations with regard to the uncharged act when she answered the prosecutor’s question about any activity other than fondling between her and White in the affirmative. McCrae, who was unable to explain why he failed to object to the prosecutor’s question, appears to have been taken quite by surprise by the victim’s response. Abandoning his tactic to “ambush” the victim by not reviewing her videotape prior to questioning her, McCrae sought leave to review the videotape of her interview with Pratt and Kemper immediately after the State had completed its questioning of the victim. Upon reviewing the tape, McCrae realized that the victim had informed Pratt and Kemper of the incident. Rather than request a limiting instruction with regard to the uncharged act after reviewing the tape,

McCrae immediately began his cross examination of the victim. Thus, he seems to have formulated his "strategy" to persuade the jury that the victim was lying about the incident in the few minutes between reviewing the tape and beginning cross examination.

*Id.* at 996. This is not like the present case, because defense counsel here did not come up with a fly-by-the-seat-the-pants strategy based on a surprise at trial. Instead, while attempting to overcome the prosecution's objection to his attempted use of the testimony, counsel explained that the defense team had listened to hours of tape recordings and could find nothing to corroborate that what Evola was saying was true (Tr. Vol. 7B at 113), and explained exactly how he intended to argue to the jurors that they should infer that Evola had made Yonkers' statements up.<sup>34</sup> Far from being unprepared to deal with unanticipated damaging testimony, counsel's move was a calculated strategy that had been thought about in advance, not a tactic that is outside the wide range of professional competence.

Finally, in subpart (e), Hale argues that his attorney was ineffective when he neither objected, nor asked for a mistrial, after the Assistant United States Attorney stated during his closing argument that the government "had evidence that the defendant had a member of his organization kill two people and shoot lots of others,"

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<sup>34</sup> Counsel explained that, in addition to Evola's motive to ingratiate himself with the FBI, Evola apparently made up at least one other damaging item about Hale, before he was being taped (Tr. Vol. 7B at 109); the government was not calling Yonkers at trial to testify as to what Hale had said (*Id.* at 108-109); the government never tried to tape Yonkers himself on the issue (*Id.* at 111); and the government never had Evola try to get Hale to talk, while being surreptitiously recorded, about what he supposedly had said to Yonkers. (*Id.* at 113.)

and attempted to inflame the jury's passion reciting passages from *The White Man's Bible* justifying the use of terrorism.

As to the government's reading portions of *The White Man's Bible*, Hale argues that doing so to imply that he also favored terrorism was an "improper attempt to inflame the jury through an appeal to passion in light of the actual, ongoing war against terrorism." (DE #18 at 39.) In e-mail messages and other communications with members of the WCOTC, Hale used terms such as "RAHOWAH" (an acronym for racial holy war), informed his followers that Judge Lefkow's order in the trademark litigation had created a "state of war" with the WCOTC, and himself quoted *The White Man's Bible* to remind his followers that it taught:

Should the Jewish Occupational government use force to violate our Constitutional rights . . . then we have every right to declare them as open criminals violating the Constitution and the highest law of the land. They then obviously are the criminals, and we can then treat them like the criminal dogs they are and take the law into our own hands. . . . We must then meet force with force and open warfare exists. It will then be open season on all Jews.

(Tr. Vol. 5 at 40.)

Throughout the trial Hale maintained, as he does now, that the "state of war" he was declaring was meant to be a legal, peaceful war engaged in through use of the courts, protest and the dissemination of information, and that *The White Man's Bible* was harmless rhetoric. (See, e.g., *Id.* at 41 (asking witness Burnett whether he agreed that *The White Man's Bible* and other writings by Klassen were "primarily nonsense.")) The government's use of the portions of *The White Man's Bible* which Hale argues was

unfairly inflammatory was not: it was fair use of the evidence to shed light on what Hale's use of terms such as war and other communications with his followers, including Evola, were intended by him to mean.

Because this was proper use of the evidence, Hale's defense counsel's failure to object caused him no prejudice. Moreover, counsel did not simply ignore the government's use of these passages. Instead, to counteract the government's tactic, defense counsel requested that a final jury instruction be given based on *Brandenburg v. Ohio*, 395 U.S. 444 (1969). (Tr. Vol. 11 at 163-64.) This resulted in the court modifying final instruction 31. (*Id.* at 166-67.) It is presumed that jurors follow the court's instructions, *Emerson*, 501 F.3d at 813, and this action by defense counsel was sufficient to address Hale's concern.

As to the government's statement that it "had evidence that the defendant had a member of his organization kill two people," it is not surprising that there was no objection. As the court explained in ruling on post-trial motions, in the context of closing argument "had" wasn't understood to mean "caused." Instead, the phrase "defendant had a member of his organization kill two people" appears to have been taken in context to mean that something happened, not that Hale caused it to happen: as the court explained previously, it was understood like the statement "I had a flat tire on the drive home." Nevertheless, however the remark was understood, and whatever

the government might have meant for the remark to mean,<sup>35</sup> the Court of Appeals found that the remark, although improper, caused no prejudice, primarily because the record showed that no one in the courtroom noticed the remark (that is, understood it as a statement that there was evidence that Hale had directed Smith's conduct); the remark, in its entire context, emphasized Hale's reaction to Smith's shooting spree, not alleged involvement before the fact; and finally, it was an isolated remark, while the evidence against Hale was considerable. *Hale*, 448 F.3d at 987-88.

Hale argues now that the Court of Appeals applied the stringent plain error standard to arrive at its finding that no prejudice resulted, but that in the present proceeding the court should recognize the remark's impact in light of the cumulative effect of all of the other errors he has shown that his defense counsel made. As this court had endeavored to explain herein, it does not agree with Hale's laundry list of errors, and believes that defense counsel did an excellent job in a case with extremely difficult facts. Thus, there is no greater cumulative impact to consider, and no prejudice resulted from the remark, which means that defense counsel's failure to object caused no prejudice. In addition, if defense counsel had objected, the Court of Appeals' explanation why prejudice did not result encapsulates why a motion for mistrial would not have been granted, and why the outcome on appeal would have been no different.

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<sup>35</sup> The government's explanation for this remark has been equivocal. *Hale*, 448 F.3d at 986-87. In its response to Hale's § 2255 motion, the government states that its prior explanations should have been "more direct," and that the statement was an unintended slip of the tongue. (DE # 30 at 20-21 n. 16.)

Thus, Hale cannot demonstrate that his attorney's failure to object to the improper remark caused him any prejudice.

5. "*Jury Selection Errors*" [Hale's ILB.5]

Hale argues that it was unreasonable for defense counsel to fail to strike a single African-American juror – while striking several Caucasian jurors – knowing that the trial would be permeated by evidence of Hale's white supremacist beliefs:

At a minimum, counsel should have explored any possible prejudice of the African-American jurors but they did not even do this.

While it is commonly believed that African-American jurors are more sympathetic to criminal defendants and thus preference for African-American jurors may fall within the bounds of a reasonable trial tactic, such a tactic by Mr. Hale's counsel was profoundly *unreasonable* considering the circumstances of *his* case.

(DE #18 at 40.)

However, the court's *voir dire* of the prospective jurors – which did incorporate the substance of many questions submitted by defense counsel (Tr. Vol. 1A<sup>36</sup> at 19-20; 278-282) – was thorough and careful, and designed to ferret out whether any of the prospective jurors, African-American or otherwise, harbored biases or prejudiced beliefs which could not be put aside. To give only a few examples, the court inquired whether any of the jurors would be offended by evidence that Hale called his racist belief system a religion, or if any had strong feelings or beliefs about race or racial prejudice (Tr. Vol. 2 at 110); whether evidence that Hale had strong negative feelings

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<sup>36</sup> The court will use "Vol. 1A" to refer to the transcript of the proceedings conducted on the morning of April 7, 2004. The transcript itself does not contain a volume number.

about racial and religious minorities would keep them from being able to impartially judge the case based on the facts in evidence (*Id.* at 112); and whether any of them, or anyone close to them, had ever been victimized, or treated differently, on account of their race, gender, sexual preference or religion. (*Id.* at 113.)

Hale hasn't shown anything suggesting that any of the African-American jurors who were selected could have been challenged for cause, and in the absence of some specific showing that any of them were biased or prejudiced, Hale is criticizing his defense counsel for doing exactly what the Constitution of the United States forbids: using peremptory challenges to discriminate solely on the basis of race.<sup>37</sup> *Georgia v. McCollum*, 505 U.S. 42 (1992); *Batson v. Kentucky*, 476 U.S. 79 (1986). As the government observes in its response, doing what the law requires cannot be the basis for an ineffective assistance of counsel claim. *Cf. United States v. Evans*, 92 F.3d 540, 544 (7th Cir. 1996) ("The refusal to act unethically by making a groundless argument can never be a ground for arguing ineffective assistance of counsel.")

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<sup>37</sup> Hale goes so far as to assert: "If discrimination against African-American jurors in a trial involving an African-American defendant is constitutionally suspect, so too should it be constitutionally suspect for a white defendant's lawyer to discriminate against white jurors in favor of African-American jurors." DE #18 at 40. The problem is, there is no record support for showing discrimination against white jurors by Hale's counsel. Whether it is true or not that Hale's counsel preferred black jurors, indulging that preference by *not* exercising peremptory challenges is not the same as discriminating against white jurors. This is particularly true where Hale has not pointed to any specific example where it would appear that a white juror was challenged for no reason other than race.

The only juror as to whom Hale makes a specific argument was a Caucasian, ironic, given that Hale's main argument is that there weren't enough Caucasians on the jury. Hale argues that M.H.<sup>38</sup> should have been challenged for cause or peremptorily because: 1) he stated that he thought he had heard that "Smith said something like he was told to go do what he had done;" 2) he had an African-American domestic partner; 3) he was an Assistant Dean at Northwestern University, where Smith's murder victim had been a basketball coach; and 4) he was a resident of West Rogers Park, "the same town where Smith had committed his shooting spree." (DE #18 at 40.) Hale argues that the failure to challenge biased jurors is constitutionally-deficient performance. See *Virgil v. Dretke*, 446 F.3d 598, 609-11 (5th Cir. 2006).

None of the facts Hale enumerates regarding M.H. necessarily show bias, and some additional information bearing on M.H.'s statements is illuminating. West Rogers Park is not a town, it is a neighborhood in the City of Chicago. Ben Smith did shoot and wound several persons in this neighborhood, in July, 1999, but juror M.H. did not move to that neighborhood until approximately 2002, three years after the shootings took place. (Tr. Vol. 2 at 69.) In fact, he moved from New Hampshire to the Chicago area, and began working at Northwestern University, in August, 1999, one month after Smith's shooting spree. (*Id.*; Tr. Vol. 1 at 223.) He explained:

[M]y partner and I had heard about the incident on the newspaper. But being from out of town, we really didn't understand what was going on,

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<sup>38</sup> The court uses initials herein for jurors and members of the venire to minimize the impact to their privacy.

and we didn't focus a lot on the news because we were busy looking for a place to live. . . . But then in August, I moved down here and by then I started working at Northwestern University. So I've worked there since August of '99 and heard about it from working on campus.

(Tr. Vol. 1 at 224-225.) When the court asked M.H. whether he had ever formed, or expressed any opinion, about Smith's shooting of the basketball coach, he answered, "I didn't know him and I was from out of town, so I didn't really have a lot to think about." (*Id.* at 226.) He told the court he thought that he could put aside everything he had heard outside the courtroom and any opinion he might have formed, base his verdict on only the evidence at trial, and render an impartial verdict. (*Id.* at 227-228.) In answer to the question whether any juror had "any strong feelings and beliefs about race and racial prejudice," M.H. stated:

I'm not exactly sure how to answer that question, but my partner's African-American, but I believe people can hold what opinions they have, it just depends on what those opinions are. I think that's something you should know, but I don't know that it would affect me, I don't think.

(Tr. Vol. 2 at 110.) The court then asked him if that would prevent him from impartially judging the facts of the case, and he answered: "I don't believe so." (*Id.* at 111.)

Based on the forgoing, Hale hasn't shown that juror M.H. had any actual bias, and thus there was no basis for defense counsel to challenge M.H. for cause. Had any such challenge been made, if made would have been overruled.

As for the failure to use a peremptory challenge, while the *Strickland* standard is already highly deferential to a lawyer's strategic decisions, particular deference is given to *voir dire* strategy, and a decision made then will not serve as the basis for an

ineffective-assistance claim unless it “is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness.” *Hughes v. United States*, 258 F.3d 453, 457 (6th Cir. 2001); see *Nguyen v. Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997). M.H. was in the first group of 12 prospective jurors. For that first group, defense counsel used four of his available ten peremptory challenges (Tr. Vol. 2 at 166-67), striking, for example, prospective juror D.S., who worked for the DuPage County Sheriff’s Department (*Id.* at 81); and D.S, whose son was beaten severely enough that he needed stitches, for the reason that he had red hair. (*Id.* at 166-67). The court cannot conclude that it was an ineffective strategy at that point to hold six peremptory challenges in reserve, *cf. Gardner v. Ozmint*, 511 F.3d 420, 426 (4th Cir. 2007), to leave on the jury a highly-educated and presumably “liberal” person who might be open to Hale’s entrapment defense. Given juror M.H.’s assurances that he could be fair and impartial, his presence on the jury didn’t infect the “entire trial with obvious unfairness,” and Hale’s defense attorney was not ineffective for not removing him.

6. “Violation of Mr. Hale’s Right to be Present For and Participate in All of Voir Dire”  
[Hale’s II.B.6]

Prospective jurors who indicated that they had prior knowledge of facts related to the case were individually asked additional questions in a small conference room adjacent to the courtroom. The court’s main reason for using this procedure was so that their answers would not taint the rest of the jury pool. Hale was not present during this individual questioning, and he now argues that his counsel was ineffective for failing to

object to that exclusion, which itself, he argues later as an independent claim, violated his rights under the Fifth Amendment and Fed. R. Crim. P. 43(a). Although the substantive merits of that claim would bear on his ineffective-assistance claim (if meritless, the ineffective-assistance claim based on it fails for lack of prejudice), the court postpones consideration of the merits here, continuing to track and address Hale's arguments in the order he makes them.<sup>39</sup>

As to his attorney's failure to object to this exclusion, in point of fact, his counsel agreed with the decision to conduct *voir dire* in this fashion, waiving Hale's presence. (Tr. Vol. 1A at 41-42.) It appears counsel did so after discussing the matter with Hale: as Hale states in his brief supporting his motion, his attorney informed the court "Mr. Hale had asked whether I thought he should come here. I said I would report back. I said I thought it okay if he was not here." (*Id.*) No further discussion of the matter occurred. Thus, Hale, who himself is an attorney, is complaining about a decision he appears to have acquiesced to, despite his assertion now that he did not consent. (DE #8-3 at 13-14 ¶ 23.) Suggesting that Hale in fact did agree with his attorney to waive his presence, the record shows that when he disagreed with his attorney's decisions, he made that known to the court. For example, he addressed the court personally regarding his concern that more peremptory challenges were needed to exercise against African-American venire members. (Tr. Vol. 3 at 24-27.)

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<sup>39</sup> Hale uses the ineffective-assistance aspect of his argument in part to explain why he didn't raise the underlying claim on direct appeal, to avoid this procedural default.

Moreover, there was an obvious strategic reason for that decision. If Hale had been present, sitting literally a few feet from the potential jurors, it is unlikely that they would have spoken with the same candor. For example, prospective juror M.F. stated “I am substantially biased against people claiming to be white supremacists based upon my heritage” (Tr. Vol. 2 at 78); prospective juror B.C. stated “I just don’t care for Mr. Hale. . . . I have a very bad opinion of Mr. Hale, let’s put it that way” (Tr. Vol. 1 at 198); and prospective juror N.A., with no prompting, blurted out: “Can I make a statement now? He’s probably a racist pig, but that’s beside the point.” (Tr. Vol. 1 at 246.)

This is not to say that it would have been proper for Hale’s attorney to waive Hale’s right to be present during this portion of voir dire without Hale’s knowledge and agreement, only that there was in fact a good reason for Hale to think it better that he be absent from the in-chambers *voir dire*, and waive his right to be present. Thus, he cannot base an ineffective-assistance claim on the supposed lack of an objection to his exclusion, where his attorney waived Hale’s right to be present, and the record indicates that Hale consented to that decision.

Hale’s knowledge that a portion of the *voir dire* was being conducted outside his presence, and apparent consent, is what differentiates this case from *United States v. Rodriguez*, 67 F.3d 1312, 1316 (7th Cir. 1995), which Hale cites in his reply brief. In *Rodriguez* the defendant was not present during several conferences in which questions, sent to the judge by the jury during deliberations, were answered. The government argued that his attorney’s failure to object was a waiver, but the Court of Appeals stated

that “a purported waiver by counsel is not adequate to effect a waiver,” immediately following that observation by noting that the “record suggests no waiver by Mr. Rodriguez, who was in custody during the deliberations.” *Id.* (Although the court in *Rodriguez* contacted counsel when the notes were received, the record did not indicate that the defendant was present or made aware of the notes. *Id.* at 1315-16.) Hale, on the other hand, was in the courtroom able to personally observe each prospective juror exiting for *in camera* follow-up questions, and the record indicates that he and his attorney discussed whether or not he should be present. Thus, the record does suggest he himself waived his right to be present.

In arriving at the conclusion that Hale’s attorney was not ineffective, it must be noted that Hale’s argument is limited to the assertion that his attorney was ineffective *for failing to object to his exclusion*. In his affidavit in support of his motion, he does state that this portion of the *voir dire* was held outside his presence “without my consent” (DE #8-3 at 14 ¶ 23), but in his reply brief in support of his motion he does not argue that he insisted to his attorney that he wanted to be present, and his attorney rejected that request, but only that the court failed to obtain his personal consent, on the record, to his absence. Thus, it is not clear what he means by “without my consent.” He never directly states that he told his attorney to insist to the court that he wanted to be present, and that his attorney refused to do so, and that failure means that Hale has no claim. *Taylor v. United States*, 287 F.3d 658, 661-62 (7th Cir. 2002). On the flip-side of the coin, if he does obliquely mean that he told his attorney he refused to consent, but his

attorney failed to abide by that request and make an objection, the court thinks that this is an after-the-fact-contradiction of the record (there is no reason to think that defense counsel would raise the issue with the court, then simply drop it if his client didn't agree to waive his presence) which doesn't gain traction. *Cf. United States v. Boyd*, 86 F.3d 719, 722-23 (7th Cir. 1996) (post-trial objection that client didn't agree with his lawyer's peremptory challenge of juror too facile to be allowed to succeed). Nevertheless, in the interest of completeness, the court considers the merits of this opaquely-made argument.

First, Hale's argument in his reply brief (DE #36 at 13-14), is that the real problem is that the court didn't address him personally and put his waiver of his right to be present on the record. This assertion can be quickly dispensed with. Hale's authority for the proposition that the court was required to do so is *United States v. Gordon*, 829 F.2d 119, 122-24 (D.C. Cir. 1987). *Gordon* is not consistent with the law of this circuit. *Boyd*, 86 F.3d at 723-24 (7th Cir. 1996). In this circuit, the court need not use that procedure even for a defendant's waiver of the right to testify. *United States v. Stark*, 507 F.3d 512, 516 (7th Cir. 2007); *Taylor*, 287 F.3d at 658.

If Hale told his attorney he wanted to be present during the in-camera portions of *voir dire*, and his attorney ignored that instruction, the familiar *Strickland* analysis applies: that is, Hale must show that his attorney's doing so fell below an objective level

of competence; and that the failure caused Hale prejudice.<sup>40</sup> Although the court has not found a case explicitly saying so, it will assume that the first prong of the test is met. A defendant's presence at every critical stage of the trial is a right rooted in the Fifth and Sixth Amendments to the United States Constitution, *United States v. Gagnon*, 470 U.S. 522, 526 (1985), and therefore appears to be one of the "core" rights, like the decision to testify, that must be made personally, and cannot be waived by defense counsel without the client's consent. See *Rodriguez*, 67 F.3d at 1316 ("a purported waiver by counsel [of right to be present] is not adequate to effect a waiver").

But at the prejudice step, Hale's claim necessarily fails. His argument is directed entirely at juror M.H., as to whom he argues:

If my attorneys . . . had informed me prior to not challenging [M.H.] as to what venireperson [M.H.] had stated to the Court and counsel in private, I would have insisted that M.H. be challenged for cause, and if the challenge for cause had not succeeded, I would have insisted that he be peremptorily excused.

(DE #8-3 at 14 ¶ 24.)

As explained above, there was no basis on which to challenge M.H. for cause, because he stated that he believed that he could put aside knowledge about the case, and opinions formed, outside the courtroom, and render an impartial verdict based solely on the evidence at trial. (Tr. Vol. 1 at 227-28.) Whether Hale believes now that he

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<sup>40</sup> It appears that even when an attorney's error causes a defendant to forego a constitutional right that must be decided upon personally, that does not constitute ineffective assistance unless the defendant shows a likely impact on the result. See *Rodriguez*, 286 F.3d at 985 (waiver of right to testify); *Barrow v. Uchtman*, 398 F.3d 597, 608 n. 12 (7th Cir. 2005).

would have insisted that M.H. be peremptorily removed is of no consequence, because the decision whether or not to use a peremptory strike belongs solely to counsel, *Boyd*, 86 F.3d at 723, and so counsel could have ignored Hale's insistence. Reviewing jury selection as a whole, it is obvious that counsel was making strategic decisions as to whom to challenge, and did not fail to eliminate M.H. through inattentiveness. Moreover, whether or not counsel might have changed his mind with Hale's input, and used a peremptory strike against M.H., Hale hasn't shown that leaving M.H. on the jury resulted in a jury that was more likely to convict an innocent man. Thus, he cannot establish the prejudice element necessary under Strickland for an ineffective-assistance claim. *Boyd*, 86 F.3d at 722.

7. "*An Inadequate Closing Argument*" [Hale's II.B.7]

The crux of Hale's argument is that he was "prejudiced by counsel's failure to argue his strongest and best defense, and to argue the facts which supported this defense." (DE# 18 at 43.) Thus, the specifics of this argument go to Hale's theory, already discussed and rejected above, that his attorney should have been arguing that Hale understood Evola to be proposing the murder of one of the attorneys, not of Judge Lefkow, that Hale therefore never agreed to any plot that Evola was hatching against the Judge, and that Hale rejected Evola's plans when he realized Evola meant Judge Lefkow.<sup>41</sup> For the reasons explained above, the court does not believe that counsel's

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<sup>41</sup> Of course, this assumes that Evola was the one proposing the scheme, the heart of the entrapment defense which Hale used. Viewing the evidence most favorably to the government, however, a reasonable jury could, and did, find that Hale inveigled Evola.

decision to pursue a different defense can be characterized as ineffective assistance. Therefore, choosing to emphasize points germane to that defense during his closing argument was also not ineffective.

8. *"Failure to Prepare Mr. Hale to Testify at Trial"* [Hale's II.B.8]

Simply put, it cannot be ineffective assistance for a lawyer to fail to prepare his client to testify, if the client has decided not to testify. In this case, although not required by the law of this circuit, Hale executed a written waiver of his right to testify (1:03CR11 DE #147), and the court examined Hale to make sure that he had done so freely and voluntarily, after discussing with his attorneys all the benefits and detriments of testifying or of not testifying. (Tr. Vol. 10 at 34-36.) His counsel then explained that Hale in fact wanted to testify, but as to certain counts only,<sup>42</sup> and was choosing not to testify only because, since those counts had not been severed,<sup>43</sup> that would be impossible and his testimony posed substantial risks. (*Id.* at 36-40.) Counsel then moved to bifurcate the counts for separate consideration so that Hale could testify (*Id.* at 39), which motion was denied. (*Id.* at 40.) This effort to make it possible for Mr. Hale to testify rather conclusively demonstrates that there was no ineffective assistance of counsel caused by a supposed failure to prepare him to do so.

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<sup>42</sup> Counsel informed the court that Hale wished to testify regarding Counts 1 and 5 only. (Tr. Vol. 10 at 36.) The jury's verdict on Count 5 was vacated as the result of one of Hale's post-trial motions, so any prejudice he may have suffered would be limited to the verdict on Count 1.

<sup>43</sup> See 1:03CR11 DE #85, denying motion to sever Counts 1 and 4. Count 4 later became Count 5 in third superseding indictment.

Hale argues now, however, that the *only* reason he chose not to testify (presumably, in regard to all of the counts, not just to two of them) was that his attorney had not prepared him to do so. It staggers the imagination that Hale, an attorney, who showed no hesitation in informing the court that he disagreed with his attorney on peremptory challenges and wanted more of them, would not have raised this issue during the court's colloquy with him concerning his waiver of his right to testify. Hale's explanation now that he wanted to testify, but didn't because his lawyer failed to prepare him, is simply "too facile" to avoid his explicit waiver. *Boyd*, 86 F.3d at 722-23; *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991).

Perhaps recognizing this problem, in his reply brief Hale skews his argument slightly. Abandoning the focus on his attorney's failure to prepare him to testify, he maintains that the waiver itself is not the issue, "but rather, the errors of counsel that prompted it" (DE #36 at 13), and argues that the real problem is that his attorney's advice on the matter was so deficient. *See Starkweather v. Smith*, 574 F.3d 399, 403 (7th Cir. 1999) (incorrect advice that induces a defendant to waive right to testify can constitute ineffective assistance). It was deficient, Hale believes, because: 1) his attorney didn't understand the facts of his case, that is, that the evidence showed that Hale didn't understand that Evola was referring to Judge Lefkow, which should have been used as the basis of his defense; and 2) the harm his attorney was worried about – that the jury would learn about his racist beliefs – had already been done because defense counsel

“had, remarkably, read from and admitted into evidence the two books embodying his beliefs.” (DE #36 at 12.)

The latter half of this contention ignores some of the facts: what defense counsel said was that Hale’s testifying “would open him up to cross-examination about his beliefs and *a lot of horrible things that he has said in the past, some of which you didn’t permit the government to put in in their case in chief.*” (Tr. Vol. 10 at 38 (emphasis added).) Other than matters on which there were evidentiary rulings, it is impossible to know what all of that evidence might have been, but Hale’s defense counsel did know. Moreover, assuming it was in the same, or worse, tenor as the information of which the court is aware that was kept out of the jury’s purview, it was a wise decision.

The first half of the contention is another variation on Hale’s theme that his counsel didn’t use the best defense, which, for the reasons the court has explained throughout this order, simply doesn’t withstand scrutiny. In short, Hale hasn’t identified any facts suggesting that his waiver resulted from ineffective assistance, therefore, his waiver of his right to testify is conclusive.

9. “*Breach of Duty of Loyalty to Mr. Hale*” [Hale’s II.B.9]

Hale argues that by making comments to the jury such as that Hale was a “jerk” and referring to his beliefs as “filth” with a “lack of moral basis,” his attorney displayed animosity to him which “added fuel to a jury that was already unsympathetic and antagonistic to Mr. Hale due to his beliefs,” and that when “his own counsel showed no respect for him” it had to have had a negative impact on the jury causing Hale

prejudice. In the court's view, no argument which Hale makes is more contrary to the reality of his counsel's performance than this one.

If the jury had thought Hale had found a kindred spirit to defend him, that undoubtedly (in light of the beliefs the jurors expressed during *voir dire*) would have caused them to cast a jaundiced eye on the entire defense, and any chance of acquittal would have been nil. Instead, the jury had to understand that Hale's attorney was acting as a professional, and asking them — as he did — to judge Hale based not on Hale's beliefs and morality (or lack thereof), but solely on the basis of whether the government had proved its case beyond a reasonable doubt. Under the circumstances, rather than having a negative impact, counsel's self-illustrative argument to the jurors that they needed to put their dislike for Hale aside appears to have been effective: if the jurors decided the case based solely on prejudice against Hale, it does not seem they would have found him not guilty on one of the solicitation counts. The court believes that, in light of the negative feelings nearly every juror revealed during *voir dire* about Hale's beliefs, his attorney's choice to admit that those beliefs are despicable, but not a basis for judging and convicting Hale, was an effective tactic, not ineffective assistance.

*C. Cumulative Effect of Counsel's Errors [Hale's III.C.]*

As a separate section of his memorandum, Hale argues that the cumulative impact of all of the "errors" discussed above "was so substantial and injurious that they affected Mr. Hale's substantial rights and undermined and infected his right to a fair and reliable trial and, therefore, cannot be considered harmless." (DE #18 at 32-33.) In

answer to this, the court can only say that ten times zero is still zero. This is not to say that counsel's performance was perfect, but it didn't have to be. "[C]ounsel 'need not be perfect, indeed not even very good, to be constitutionally adequate.'" *McAfee v. Thurmer*, 589 F.3d 353, 355-56 (7th Cir. 2009) (quoting *Dean v. Young*, 777 F.2d 1239, 1245 (7th Cir. 1985)). The question to be answered is not "whether counsel's performance was error-free, but rather whether counsel was effective overall." *Gray v. United States*, 341 Fed. Appx. 193 at \*3 (7th Cir. 2009). Viewing the performance of Hale's defense counsel cumulatively, this standard was met.

## II. Violation of the Right to Be Present at All Critical Stages of the Trial [Hale's IV]

As his second ground for relief pursuant to § 2255, Hale argues that his rights under both the Fifth Amendment of the Constitution of the United States and Fed. R. Crim. P. 43(a) were violated when he was excluded from the portion of juror *voir dire* dealing with the potential jurors' exposure to pretrial publicity. Hale asserts that his failure to raise this claim on his direct appeal is of no consequence because he has demonstrated that he is actually innocent. *Bousley v. United States*, 523 U.S. 614, 622 (1998). In addition, in an amendment to his motion made on August 12, 2009 (DE #37), Hale argues that the violation of his right to be present is a "structural error" which requires an automatic reversal without any analysis as to whether the error caused him harm.<sup>44</sup> *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991).

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<sup>44</sup> In his initial motion, Hale argued that a harmless-error standard applied.

The first defect with this argument, stopping it dead in its tracks without the need of extended analysis, is already stated above. In the court's discussion of this issue in connection with the ineffective-assistance claim Hale bases on it, the court explained why it believes that the record demonstrates that Hale waived his presence. Hale was not "excluded" from any portion of voir dire. Instead, his attorney, with Hale's obvious acquiescence, waived Hale's presence. That means that the only way the claim can be raised is under the rubric of ineffective assistance of counsel, because "steps the court takes at the defendant's behest are not reversible, because they are not error; even the "plain error" doctrine does not ride to the rescue when the choice has been made deliberately, and the right in question has been waived rather than forfeited." *Boyd*, 86 F.3d at 722 (citing *United States v. Olano*, 507 U.S. 725, 732-34 (1993)). Thus, because the right in question was deliberately waived, Hale has no Fifth Amendment/Rule 43 claim to assert, and the court rests its denial on this basis.

Alternatively – assuming that the court's opinion that the record shows that Hale waived his right to be present is incorrect – a second waiver of the issue prevents its assertion now. The failure to raise an issue on direct appeal – even one of Constitutional dimension – bars it from being raised in a collateral attack under § 2255, unless the defendant shows either good cause for failing to raise it on appeal, and resulting prejudice, or that he is actually innocent. *Bousley v. United States*, 523 U.S. 614, 622 (1998). In his initial motion Hale argues that he has demonstrated actual innocence, so he need not address cause and prejudice, although he does so briefly in a footnote.

Much later, in his reply to the government's response to his motion arguing that his absence from *voir dire* was a structural error, Hale fleshes out his cause-and-prejudice argument. Although this goes beyond the issue raised by his amendment concerning the standard of review, the government amplified its waiver argument when it responded to Hale's amendment, so the court will consider Hale's additional argument.

First, though, comes the argument Hale makes initially: that he has demonstrated actual innocence. Actual innocence does not mean a legal insufficiency, it means factual innocence, and is shown when a defendant demonstrates that, in light of all the evidence, it is more likely than not that any reasonable juror would not vote to convict. *Bousley*, 523 U.S. at 623. Hale's entire argument on actual innocence is premised on his belief that "had his jury known that Judge Lefkow was not the 'Jew rat' on December 5, 2002, it is indeed more likely than not that no reasonable jury would have convicted Mr. Hale." (DE #46 at 2.) As the court has explained herein, and on multiple prior occasions in this case, it disagrees completely with that interpretation of the evidence, even if the portion of the recording which Hale believes is crucial is understood to read as Hale believes it should. Thus, Hale has not demonstrated that his procedural default is excused by actual innocence, turning the inquiry to whether he can demonstrate cause and prejudice.

Hale argues that the cause for failing to raise this issue on his direct appeal is that he did not have transcripts of the *voir dire*, and that "[w]ithout access to and possession of the voir dire transcripts, Mr. Hale could not have raised this issue on appeal." (DE

#18 at 34 n. 8.) As the government points out (DE #42 at 2), Hale represented himself on appeal and was obviously aware that he had been “excluded” from *voir dire* (indulging Hale’s characterization of what occurred), yet he chose not to include that issue in his direct appeal, resulting in waiver.

Hale’s reply is that he did not receive copies of the transcripts of *voir dire* until sometime after June 9, 2005, the day he filed his opening appellate brief (DE #8-3 at 16 ¶ 4), and that without those transcripts, he “could not have reasonably been expected to articulate his argument that he had been absent for a substantial portion of the *voir dire* proceedings and that his absence . . . had been involuntary.” (DE #46 at 3.) Moreover, Hale argues, had he raised the issue, without the transcripts he would have been unable to support it with the specificity required by Fed. R. App. P. 28(a)(9)(A), which would have resulted in waiver.<sup>45</sup>

First off, this is a “Catch-22:” if Hale is correct that a structural error occurred as to which he need not even show prejudice — the argument he raised which gave him the opportunity to explain why he needed the *voir dire* transcripts for his direct appeal — then he didn’t need the transcripts to make the argument on his direct appeal. His argument now is that the record shows that he did not personally waive his right to

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<sup>45</sup> Whether or not Hale is correct, had he raised the issue on direct appeal he would have a better argument to respond to the procedural default facing him now. Moreover, both of the cases Hale cites (*United States v. Elst*, 579 F.3d 740, 747 (7th Cir. 2009); *United States v. Beaumont*, 972 F.2d 553, 563 (5th Cir. 1992)) to support his waiver argument focus on arguments waived because made in conclusory, undeveloped fashion, not because they fail to cite to the record.

be present (which he knew before he had access to the *voir dire* transcripts) and that his exclusion from the process is a structural error entitling him to an automatic reversal, without any need to show that the exclusion caused prejudice. The transcripts, on the other hand, would only be needed to show prejudice: thus, Hale could have raised the issue, and made his argument, without the transcripts.

But even putting this logical circularity aside, Hale offers no explanation why he didn't simply seek an extension of time pursuant to Fed. R. App. P. 26 to file his opening brief, in order to allow him to obtain and review the *voir dire* transcripts first. Actually, Hale does offer an explanation in his reply brief, but it is not a good one: he states that he did not seek the transcripts because he had been told by the attorney representing him during post-trial proceedings that "he was not allowed to have [them]," and whether that was "correct or false, it was legally sufficient cause"<sup>46</sup> for him not to seek to obtain them prior to his appeal. (DE #46 at 3.)

The court disagrees. Hale states in his affidavit that he was told by his attorney that he was not allowed to have the *voir dire* transcripts because they were under seal. (DE #8-3 at 15-16 ¶ 33.) Hale discharged his attorney, and began representing himself, on August 10, 2004, six months prior to filing his notice of appeal. If he believed that his "exclusion" from *voir dire* was an issue that might be important enough to pursue on appeal, he offers no reason why he did not ask the court to lift the seal (and in fact, there

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<sup>46</sup> This qualification was necessary because any such advice was in fact incorrect. Only a brief portion of *voir dire* was under seal, the portion where Hale addressed the court personally to request more peremptory challenges.

was no seal) so that he could order the transcripts. In fact, the court's records show that the transcript volumes containing the *in camera voir dire* were filed with the District Court Clerk on May 25 and June 2, 2005, before Hale filed his opening appellate brief on June 9, 2005.<sup>47</sup> (1:03CR11 DE ##296, 297.) That can only mean that Hale (himself, or through his stand-by counsel, Thomas Gibbons) ordered the transcripts sometime earlier,<sup>48</sup> lending further support to finding that Hale could have requested an extension of the briefing schedule<sup>49</sup> in order to consider those transcripts, and has procedurally defaulted his claim. Finally, Hale also doesn't explain why, after he received the *voir dire* transcripts—presumably before appellate briefing was closed and long before oral argument—he didn't request leave to amend or supplement his appellate brief to include the issue. Under the circumstances, the court finds that Hale has not established cause for his failure to raise the issue of his absence from portions of *voir dire* on his direct appeal, and that procedural default bars him from raising it now.

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<sup>47</sup> Hale is vague as to when he received the transcripts, stating that it was "sometime after" he filed his appellate brief on June 9, 2005. (DE #8-3 at 16 ¶ 34.)

<sup>48</sup> The copy of the transcript order form that appellant Hale should have filed with the clerk as required by Fed. R. App. P. 10(b)(1)(A)(iii) does not appear on the docket; neither does it appear that the copy required by Fed. R. App. P. 11(b)(1)(A) was docketed in Hale's appeal (No. 05-1922).

<sup>49</sup> Entry #8 on the docket sheet for Hale's appeal (No. 05-1922) indicates that he did request an extension of time to file his opening brief, for the reason that he had been transferred to a new place of incarceration without his legal materials. Entry #9 shows that his request was granted, and he was given until June 16, 2005, to file his brief. Because he is vague as to when he actually received the transcripts, it is unknown whether, if he had waited until June 16 to file his brief, he would have had them before then.

## CONCLUSION

The court does not believe that Hale has alleged any facts that require an evidentiary hearing to resolve Hale's motion seeking to vacate his conviction, therefore, his request for an evidentiary hearing is **DENIED**. For the reasons explained above, Hale's motion to vacate his conviction pursuant to 28 U.S.C. § 2255 (DE #1) is **DENIED**. The court must now issue or deny a certificate of appealability ("COA"), or order briefing as to whether one should issue. Rule 11(a), Rules Governing Section 2255 Proceedings for the United States District Courts. The court **DENIES** the issuance of a COA. A COA should issue only if the movant has made a substantial showing of the denial of a constitutional right, that is, that reasonable jurists would find it debatable whether the district court correctly resolved the issues or would conclude that those issues are adequate to deserve further proceedings. 28 U.S.C. § 2255(d); 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 337-38 (2003). The court believes that the explanation herein for the denial of Hale's motion adequately explains why this standard has not been met. The clerk is directed to enter a final judgment of dismissal.

**SO ORDERED.**

Date: July 22, 2010

s/James T. Moody  
JUDGE JAMES T. MOODY  
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

|                           |   |                |
|---------------------------|---|----------------|
| MATTHEW HALE,             | ) |                |
| Defendant-Movant,         | ) |                |
|                           | ) |                |
| v.                        | ) | No. 1:08 CV 94 |
|                           | ) |                |
| UNITED STATES OF AMERICA, | ) |                |
| Plaintiff-Respondent.     | ) |                |

OPINION AND ORDER

This matter is before the court on defendant-movant Matthew Hale's motion pursuant to RULE 59(e) of the FEDERAL RULES OF CIVIL PROCEDURE, (DE # 52), requesting the court to reconsider its decision and vacate its final judgment of July 22, 2010, which denied his motion collaterally attacking his conviction via 28 U.S.C. § 2255. The government responded in opposition, (DE # 58), and Mr. Hale filed a reply. (DE # 64). Mr. Hale later supplemented his motion. (DE # 66). The government has not responded to the supplement.<sup>1</sup>

There are only three grounds for a motion pursuant to RULE 59(e): the court may alter or amend a judgment when the movant presents newly-discovered evidence, shows that there has been an intervening change in the law, or demonstrates that the

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<sup>1</sup> The government may have assumed no response was necessary, because the supplement is in effect an attempt to bring additional evidence in support of his § 2255 motion, after judgment, even though the evidence was previously available to him. In the interest of complete consideration of the issue whether Mr. Hale's motion should be granted (and, if the § 2255 were re-opened, the additional evidence would then be allowed), the court will consider the supplement. See *Rodriguez v. United States*, 286 F.3d 972, 980 (7th Cir. 2002) (although party should have judgment reopened pursuant to RULE 59, then seek to amend, justice may require something less).

court has committed a manifest error of law. *Obriecht v. Raemisch*, 517 F.3d 489, 494 (7th Cir. 2008); *Cosgrove v. Bartolotta*, 150 F.3d 729, 732 (7th Cir. 1998). Mr. Hale's motion falls squarely in the latter category. In brief, Mr. Hale contends that: 1) the court erred by not holding an evidentiary hearing, more specifically by a) instead presuming that a number of decisions made by his defense counsel were based on strategy, and b) not hearing Hale's testimony supporting his claim he always knew Tony Evola was a government informant; 2) the court erred by applying the wrong legal standard in deciding his § 2255 motion; 3) the court failed to understand his argument regarding his defense attorney's concession regarding the solicitation of the murder of lawyer James Amend; 4) the court erred in finding that Mr. Hale waived (by not raising it in his direct appeal) the issue of his absence from portions of the voir dire of prospective jurors; and 5) the court overlooked a transcript of a recorded conversation confirming that Mr. Hale told government informant Tony Evola that he (Hale) wished that Ben Smith had shot Hale in the leg, rather than going on a shooting spree targeting minority individuals.

#### **I. Whether the court erred by not holding an evidentiary hearing**

##### *A. Presumption trial counsel made strategic decisions*

Mr. Hale's first argument is that:

The Court erred by repeatedly presuming to know what was on the mind of defense counsel – whether their thoughts were guided by a reasonable strategy, an unreasonable strategy, or by ignorance – without holding an evidentiary hearing to determine through testimony what those thoughts and strategies or non-strategies were. Without an evidentiary hearing, one simply does not know why counsel performed, or failed to perform, many, if not most, of their actions.

(DE # 52 at 3.<sup>2</sup>) He then provides several specific examples of decisions which the court found were reasonable strategic decisions, but as to which he believes he has made enough of a showing to require a hearing to demonstrate that the decisions were either non-strategic, thoughtless errors, or were made for a reason other than a reasonable strategy (for example, animosity towards Mr. Hale).

As an initial matter, Mr. Hale is simply wrong in asserting that this court—or any court reviewing a § 2255 motion—errs by “presuming to know what was on the mind of defense counsel.” Instead, ineffective-assistance is measured by an objective standard, with a strong presumption that counsel’s performance was effective, *Strickland v. Washington*, 466 U.S. 668, 688, 690 (1984), and decisions that appear to have been made pursuant to a viable strategy will not be second-guessed by a judge playing the role of “Monday-morning quarter-back.” *Smith v. Gaetz*, 565 F.3d 346, 354 (7th Cir. 2009). It is in this light that Mr. Hale’s assertion regarding the court’s failure to hold a hearing to evaluate his counsel’s decisions must be reviewed. That alone is essentially enough to reject Mr. Hale’s claim of error, based on the performance-prong alone of ineffective assistance analysis.<sup>3</sup> The court will briefly elaborate on Mr. Hale’s specific assertions,

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<sup>2</sup> Throughout this order, the court cites to the record using the docket number and pagination from the banner placed on the document by the CM/ECF system.

<sup>3</sup> Mr. Hale’s defense counsel succeeded in obtaining a jury acquittal on the charge that he had solicited Jon Fox to murder Judge Lefkow: a charge which, in the court’s view, the evidence of Hale’s guilt was very strong. “There is a strong presumption for finding counsel effective, and Banks bears the burden of proving otherwise. In cases such as this, where counsel has succeeded in having his client acquitted of at least one of the charges brought, the presumption is likely to be even more difficult to rebut.”

however, explaining why counsel's actions were objectively reasonable, and commenting on the prejudice prong as well.

First, Mr. Hale asserts that the court erred by failing to hold a hearing to determine whether, had trial counsel interviewed government witness James Burnett prior to trial, counsel would have learned that Burnett's testimony was coerced. A claim that failure to interview a witness is ineffective assistance requires a § 2255 movant to demonstrate specifically what information, helpful to the defense, the interview would have uncovered. *See United States v. Lathrop*, 634 F.3d 931, 939 (7th Cir. 2011). Hale believes he has done this by alleging that an interview would have revealed that the government had coerced Burnett into giving false testimony at trial. This is based on speculation piled upon speculation, however, and not upon an evidentiary proffer which requires a hearing.

First, it assumes that Burnett would have voluntarily revealed government coercion, at the very time he was being coerced (and which he did not reveal under strong cross-examination at trial). Moreover, there is no viable showing of any such coercion. An affidavit from Burnett, stating that his testimony against Mr. Hale resulted from governmental coercion is required at a minimum. *See Wright v. Gramley*, 125 F.3d 1038, 1044 (7th Cir. 1997). Instead, all that Mr. Hale offers is his brother's affidavit recounting having run into Burnett in a bar following the trial, at which time Burnett tearfully explained that he testified against Mr. Hale because of government coercion.

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*United States v. Banks*, 405 F.3d 559, 568 (7th Cir. 2005) (citation omitted).

The hearsay nature of Burnett's alleged statement makes Mr. Hale's brother's affidavit of no evidentiary value on the issue.<sup>4</sup> Even assuming Burnett did make the statement, under the circumstances—a teary, bar-room apology—it is not a post-trial recantation that rings with credibility. Without an affidavit from Burnett (which has not even been supplied in support of Mr. Hale's RULE 59(e) motion), the court did not err re was no reason to hold a hearing.

Second, Mr. Hale argues that the court should have held an evidentiary hearing to find out if the reason that his defense attorneys didn't call any witnesses was because they wanted to "get the trial over with in order to begin work on the 'new big case' and because they did not feel that Mr. Hale's family had paid them enough money," as Mr. Hale alleges they told him in his affidavit. (DE # 52 at 3-4.) Although this assertion is facially implausible—if true, why would his defense attorneys reveal this to him, and why would his defense team, headed by one of the more prominent criminal defense attorneys in Chicago, want to give short-shrift to a trial which at the time was receiving extensive media coverage to work on some other "big case"—implausibility is not the reason the assertion does not require a hearing. A hearing is not required because the subjective reason defense counsel didn't call witnesses is unimportant, unless Mr. Hale can identify witnesses whose testimony would have made a difference to the outcome.

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<sup>4</sup> "As this court has noted before, "[i]t is the rule of this [c]ourt that in order for a hearing to be granted, the petition must be accompanied by a detailed and specific affidavit which shows that the petitioner had actual proof of the allegations going beyond mere unsupported assertions." *Galbraith v. United States*, 313 F.3d 1001, 1009 (7th Cir. 2002) (citations omitted).

This is not to say that Mr. Hale has failed to name witnesses and proffer their testimony, only that the court believes its explanation when denying his § 2255 motion why those witnesses would have made no difference was more than adequate.<sup>5</sup>

Next, Mr. Hale argues that an evidentiary hearing must be held to determine whether or not his defense counsel “actually *did* believe” (DE # 52 at 4) that the word “information” in a recorded conversation between Hale and informant Evola meant only one address (not multiple addresses, which counsel allegedly would have understood had he prepared for trial more extensively). The court has explained at length, both in rejecting post-trial motions and Mr. Hale’s § 2255 motion, why this argument is meritless, to such an extent that saying more now is redundant. Nevertheless, reiterating and in addition to everything said previously, an evidentiary hearing is unnecessary because: 1) the record shows that counsel did understand that the word meant multiple addresses;<sup>6</sup> and 2) counsel’s choice to present a defense based on a view that a jury would understand the conversation at issue to be focused on Judge

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<sup>5</sup> It should also be noted that Mr. Hale’s attorney argued to the jury during closing that the government’s case was so preposterous that a defense case was unnecessary, evidence that this was a strategic decision intended to emphasize the unreliability and bias of the government’s witnesses, and the entrapment defense presented.

<sup>6</sup> Defense counsel’s cross-exam of Evola illustrates: “Now, that e-mail I just showed you, December 4, that was an e-mail where he’s [Hale] asking for *addresses*, correct?” (Trial transcript, Vol. 9 at 76) (emphasis added.) “And it says in there [December 5 e-mail] that he’s [Hale] in the process of getting *the people’s home addresses in there*, correct?” (Id. at 79) (emphasis added.)

Lefkow's address was objectively reasonable, thus defense counsel's subjective understanding (although shown by his cross-examination of Evola) is irrelevant. *See Ebert v. Gaetz*, 610 F.3d 404, 415 (7th Cir. 2010) (noting that even defense counsel's own admission that he was ineffective is entitled to no weight, because ineffective assistance is judged by objective standard).

Fourth, Mr. Hale argues that a hearing is necessary to determine whether his defense counsel in fact secured his assent to be absent from portions of individual voir dire of prospective jurors. The court addressed this issue at length in its order denying Mr. Hale's 2255 motion, explaining, among a number of other reasons including lack of prejudice, that Mr. Hale did not even clearly assert that he had not consented to the voir dire method used, and if that should be presumed to be his contention, it was an after-the-fact contradiction of the record unworthy of credence. *Cf. United States v. Boyd*, 86 F.3d 719, 722-23 (7th Cir. 1996) (post-trial objection to lawyer's peremptory challenge of juror simply "too facile"). Mr. Hale has not explained in his present motion why the court's prior reasoning was legally flawed, and the court therefore sees no reason to discuss this issue further.

Fifth, Mr. Hale argues that a hearing is necessary to determine whether his defense counsel misrepresented to the court that Mr. Hale only wished to testify as to certain counts. Given the court's holding in its order denying the § 2255 motion that Mr. Hale, who is an attorney, executed a valid written waiver of his right to testify, which the court questioned him about in open court, this contention is meritless.

Sixth, Mr. Hale argues a hearing is required to determine whether his attorneys' "personal contempt for Mr. Hale negatively affected their legal judgment concerning jury selection, choice of defense, investigation, and putting on a case." Again, ineffective assistance is measured by the objective standard set out in *Strickland*. Without showing how his attorneys' performance failed to meet this standard and caused him prejudice, their personal feelings towards Mr. Hale are irrelevant, *United States v. Mutuc*, 349 F.3d 930, 934 (7th Cir. 2003), making a hearing unnecessary.

Seventh, Mr. Hale argues a hearing is necessary to determine whether his attorney discriminated against potential white jurors on purely racial grounds. Just as the court previously stated when denying his § 2255 motion, Mr. Hale has simply shown nothing suggesting that white jurors were discriminated against, except speculation based on the use of peremptory challenges against white, but not black, venire members.<sup>7</sup> He argues now that the support the court demands on this issue can only come from the testimony of defense counsel and Mr. Hale himself at an evidentiary hearing, but that would be a fishing expedition. A hearing is not required based on nothing more than speculation. *Galbraith v. United States*, 313 F.3d 1001, 1009 (7th Cir. 2002).

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<sup>7</sup> Without more explanation, Mr. Hale is essentially arguing that peremptory challenges should have been used against blacks simply because of their race. He personally made a similar argument to the court, during jury selection. (Trial Tr. Vol. 3 at 24-27.)

Eighth, Mr. Hale argues that the court erred by not holding an evidentiary hearing to determine if “counsel’s concern about opening up Mr. Hale to cross-examination was in fact greatly exaggerated, the concern stemming largely from counsel’s personal contempt for Mr. Hale rather than based on reasoned legal judgment.” (DE # 52 at 5). For the reasons already given — Mr. Hale validly waived his right to testify, and his attorneys’ personal regard (or lack thereof) for him is irrelevant — this contention is meritless. In addition, his attorney requested a bifurcation of certain counts precisely so that Mr. Hale could testify, which request the court denied. That request, along with counsels’ explanation for not having Mr. Hale testify, shows that a strategic decision was made which was objectively reasonable, and which will not be second-guessed. Thus, there is no need for an evidentiary hearing on this issue.

*B. Hale’s contention that he knew Evola was an informant*

As a separate argument, Hale maintains that his contention that he knew Evola was a government informant has been supported by substantial evidence. He argues that a hearing should have been held for him to give a detailed explanation of that belief,<sup>8</sup> and to explore why his defense counsel did not utilize that belief to show the

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<sup>8</sup> Mr. Hale has provided a lengthy and detailed declaration (DE # 52-2) explaining all of the reasons he suspected that Evola was a government informant, which he believes justifies an evidentiary hearing. However, he could have testified to all of this information at trial, and the short answer to why this is not fodder for an evidentiary hearing is that Mr. Hale chose to waive his right to testify.

jury that Hale did not have criminal intent when meeting with Evola, but instead played with Evola knowing that no harm would come to Judge Lefkow.

In this form, this argument is to some extent – perhaps largely – a new argument, and RULE 59(e) motions cannot be used to advance new arguments that could have been made previously. *County of McHenry v. Ins. Co. of the West*, 438 F.3d 813, 818 (7th Cir. 2006). Hale’s original argument went only to his counsel’s failure to call witnesses Robertazzo and Peterson, who would have testified that Mr. Hale had told them he suspected Evola was an informant. It bears noting immediately, as the court pointed out when denying the § 2255 motion, Robertazzo’s affidavit didn’t even say that: she states only that she had told Mr. Hale that she suspected that Evola was an informant.

Taking the argument as it is presented, however, by assuming Mr. Hale is merely clarifying his previous argument, his alleged belief that Evola was an informant could have come in at trial only through his own testimony, perhaps corroborated by the evidence provided in Mr. Hale’s supplemental filing, and that of Robertazzo and Petersen (except as noted, Robertazzo’s affidavit doesn’t say that Mr. Hale told her that). The court had already held that Mr. Hale’s waiver of his right to testify was valid, so there would have been no evidence from him, leaving only Peterson to testify that Mr. Hale had told him that.

But if the court puts all that aside, and assumes that Mr. Hale would have testified that he thought Evola was an informant, and that Peterson and Robertazzo would have corroborated that testimony, defense counsel would have had to weigh the

value of that evidence, intrinsically and in light of the other evidence. First, Peterson and Robertazzo were both sympathizers of Mr. Hale and of his white supremacist philosophy, and this bias would have discounted their credibility. Second, Mr. Hale's testimony on the issue would have been obviously self-serving, particularly in light of evidence that: 1) the chain of events leading to the charges against Mr. Hale had started with an e-mail he sent to a number of his followers – not just Evola – mentioning that a state of war existed against Judge Lefkow and others, and then quoting his church's "bible" teaching that they "obviously are the criminals, and we can then treat them like the criminal dogs they are and take the law into our own hands. . . . We must then meet force with force and open warfare exists. It will then be open season on all Jews;" 2) that then Mr. Hale sent an e-mail only to Evola, seeking Judge Lefkow's home address; and 3) testimony from a former close associate of Mr. Hale's, Jon Fox, that after Mr. Hale was charged he wrote a letter to Fox asking him to "remember" that he (Hale) had thought Evola was an informant. Fox testified that Hale had never said that, and he therefore thought Hale was asking him to lie about the issue.

This is where Mr. Hale's supplemental filing comes in, which he contends corroborates his proposed testimony that he knew, beginning in January, 2001, that Evola was an informer. The filing (DE # 66-1) is a transcript of a videotaped conversation among Hale, Evola and John Schlismann that occurred on December 3, 2000. In it, Hale explains that he knows an individual named Eric McGowan is an informant, posits that the reason McGowan didn't propose committing crimes might be

because “he knew that that would be a real big red flag,” (DE 66-1 at 5 lines 16-18), and explains that there were good reasons to keep McGowan active in Mr. Hale’s organization, without letting McGowan know that Hale was wise to him.

Mr. Hale has provided a verified declaration explaining that he first suspected Evola was an informant in January, 2001, when Evola suddenly proposed violence be committed against a former Hale associate, Ken Dippold, which he viewed as a “red flag.” (DE # 52-2 at 2, ¶ 4.) Thus, the conversation recorded one month earlier, in which he expressed the same “red flag” theory about McGowan, and explained why keeping McGowan active in the organization, would corroborate his explanation that he knew Evola was an informant and had good reasons to keep an unknowing Evola within his confidence.

There is an obvious reason, however, why defense counsel would not have found this evidence as compelling as Hale portrays it now. According to Hale, he first suspected Evola when Evola spontaneously proposed violence against Dippold, in January 2001; but in the very recording at issue, from December 3, 2000, *Evola proposes violence against Dippold*. Evola asks: “What are we gonna do about this, this uh, traitor?” (DE # 66-1 at 1, line 1.) After Mr. Hale explains that while he wishes he could snap his fingers and “the bastard would drop dead hideously right now,” (DE # 66-1 at 1, line 11), there are reasons instead to be legal, peaceful and follow the rules, Evola proclaims: “I kinda think that he should be taken care of though.” (DE # 66-1 at 2, line 11.) It is clear that Mr. Hale understands Evola to mean violence, because he responds: “I

wouldn't lose any damn sleep over it, but you know my policy has to be well, you know, we're legal and we're peaceful and that's the only way we can survive right now, you know." (DE # 66-1 at 2, lines 12-15.) Later in the conversation, Hale explains his "red flag" theory about McGowan. Therefore, Mr. Hale had a reason to suspect Evola earlier than he acknowledges, and it would be odd for him to proceed to explain to Evola how an informer might tip himself off, after Evola had done just that. More precisely, it is reasonable to determine a jury would view the conversation in this way, and so decide not use it.<sup>9</sup>

In short, defense counsel—and Mr. Hale himself—had to weigh weak evidence of Hale's supposed belief that Evola was an informant against the risks inherent in Mr. Hale testifying in his own defense. Choosing not to use the evidence was not an unreasonable decision. Moreover, all of this evidence would have been in service to Mr. Hale's now-proposed alternative defense, and the court has explained extensively why it wasn't objectively unreasonable to choose to use an entrapment defense instead. As a result, an evidentiary hearing now to delve into the details of the truth or falsity of whether Mr. Hale believed that Evola was an informant is not necessary.

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<sup>9</sup> Mr. Hale also argues that portions of the conversation showing that he believed in peaceful, legal action should have been played for the jury. As he admits, however (DE # 66 at 1, n. 1), portions of the conversation showing just that (DE # 66-1 at 1, lines 2-6; at 2, lines 13-16) were played to the jury. Attorneys are not ineffective for not using cumulative evidence. *United States v. Jackson*, 935 F.2d 832, 845-46 (7th Cir. 1991).

## II. Whether the court erred by applying the wrong legal standard

Mr. Hale's second argument is that the court erred by applying the wrong legal standard in evaluating his ineffective assistance claim, improperly treating it as a motion for a judgment of acquittal, by:

holding that, anytime a reasonable *jury* could have found *guilt*, Mr. Hale's counsel also *ipso facto* acted *reasonably*. This is of course not the issue. Whether a reasonable jury could still have found Mr. Hale guilty *without* the alleged errors of counsel is not relevant as to whether the errors of the counsel were themselves *unreasonable* (and thus deficient) and undermined confidence in the outcome (and thus prejudicial).

(DE # 52 at 7.) He then quotes a number of passages from the court's opinion and order to support this assertion, for example: "Viewing the evidence most favorably to the government, however, a reasonable jury could, and did, find that Hale inveigled Evola." (DE # 52 at 7 (Opinion and Order at 70, n. 41 (DE # 50 at 70, n. 41))) Mr. Hale then concludes:

The issue is not what a "reasonable view" of the evidence might be nor what a reasonable jury *could* have found "[v]iewing the evidence most favorable to the government" but rather whether *counsel* were unreasonable in failing to challenge key elements of the government's case. . . . Simply put, the government is not supposed to receive the benefit of any evidentiary inferences against Mr. Hale pursuant to the resolution of a § 2255 motion. By allowing the standard for a motion for judgment of acquittal to repeatedly seep into its reasoning, the Court subjected Mr. Hale to a much higher burden than the law for ineffective assistance provides, namely forcing him to prove that *no* jury would have seen matters other than as he claims, which is an impossible standard on its face.

(DE # 52 at 9.)

As an initial matter, although the court agrees with Mr. Hale that the standard applicable to an ineffective assistance of counsel claim (brought in a § 2255 motion or elsewhere) is different than the standard applicable to a motion for a judgment of acquittal, the court does not agree with Mr. Hale's implied assertion that obtaining relief via § 2255 presents a movant with a lesser burden than does a motion for a judgment of acquittal. "Because habeas relief is an extraordinary remedy, the standards that a §2255 petitioner must meet are necessarily more stringent than those required of a criminal complainant on direct review, or a plaintiff in a civil suit." *Paters v. United States*, 159 F.3d 1043, 1060 (7th Cir. 1998) (Coffey, J., concurring and dissenting). A motion for a judgment of acquittal, which may be made even before the jury returns its verdict, is not directed at a final judgment, while a motion under § 2255 is a collateral attack on a final judgment. The interest in the finality of judgments limits the scope of collateral review, *Ryan v. United States*, 645 F.3d 913, 915 (7th Cir. 2011), and when the claim is based on ineffective assistance, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 690.

Nevertheless, and no matter where the two motions should be placed on the continuum of stringency in the standard for relief, the court does not believe that it erred by applying the wrong standard. As the court clearly stated in its order denying Mr. Hale's § 2255 motion, the standard for a § 2255 motion was established by *Strickland*, and requires the movant to show that his attorney's performance fell below

an objective standard of reasonableness (that is, outside the wide range of professional competence), and prejudice, that is, a reasonable probability of a different outcome had the attorney's errors not occurred. This is the standard the court applied.

As the government argues in its response to Mr. Hale's motion, in assessing counsel's performance under that standard, the court used the language Mr. Hale objects to either: 1) in commentary which has nothing to do with counsel's performance under that standard; or 2) in assessing the reasonableness of counsel's strategic choices in light of the way the evidence might be viewed, as part of the application of the appropriate standard. As an example of the first of these two uses, the comment quoted above ("[v]iewing the evidence most favorably to the government, however, a reasonable jury could, and did, find that Hale inveigled Evola") was made in a footnote observing that the alternative defense theory proposed by Mr. Hale in his § 2255 motion would have required the jury to find that Evola proposed the scheme to Hale, and that same theory was at the heart of the entrapment defense which was used, and which the jury rejected. Another example is on page 13 (DE # 50 at 13) of the order: "[T]he court has already painstakingly explained why, when the evidence is viewed as a whole, the most plausible interpretation of the initial conversation between Hale and Evola is that Hale understood Evola to be referring to the "extermination" of Judge Lefkow." This comment was directed at one of the evidentiary arguments underpinning Mr. Hale's alternative defense theory, and was intended to incorporate the court's prior explanations of the reasons why that interpretation was not plausible.

An example of the second use of such comments, on page 14 (DE # 50 at 14) of the order the court stated: "As has been explained previously and again herein, while that [Hale didn't need to correct Evola] might be a reasonable view of the evidence, it is not the only reasonable view, and is one the jury rejected." The context of this comment is as follows. In his § 2255 motion, Mr. Hale argued he thought that Evola was proposing the murder of James Amend, but then Evola suddenly switched the plan to Judge Lefkow. In his reply to the government's response questioning why Hale didn't object to the change in plans, Hale argued that he didn't need to correct Evola, because he had never asked Evola to do anything in the first place.

The court's comment that "while that might be a reasonable view of the evidence, it is not the only reasonable view" went to the court's explanation of why it was a reasonable strategic decision, based on the evidence, for Mr. Hale's counsel to proceed on the theory that Hale had always understood Evola to be discussing Judge Lefkow, rather than on the alternative defense proposed by Hale in his § 2255 motion (which depended on interpreting the first conversation between Evola and Hale as having Hale understanding Evola to be talking about attorney Amend). It should go without saying that the only way to determine whether an attorney's choices are objectively reasonable is to interpret those choices in light of the evidence.

The above discussion refutes three of the ten examples provided by Mr. Hale of the court supposedly applying the wrong standard. Rather than belaboring the point further by going through the remaining seven, the court reiterates that each of them, in

context, is understood in a similar fashion, and that the court applied the correct standard in analyzing Mr. Hale's ineffective assistance claim.

### **III. Whether the court misunderstood argument concerning attorney Amend**

Summarizing as briefly as is possible, in his § 2255 motion Mr. Hale argued that his attorney was ineffective for not using Hale's "best" defense, which was, he asserts, that he understood Evola to be proposing the murder of lawyer Amend. When he realized that Evola was changing the target to Judge Lefkow, he rejected the plan. The government responded that this would have been a risky defense choice, as it required conceding that Hale had a murderous intent, but directed at someone other than Judge Lefkow. In his reply, Mr. Hale argued that his alternative defense would not have required that concession. In denying Mr. Hale's § 2255 motion, the court commented that it did not understand "the nuances" of how avoiding that concession would have been possible.

In his RULE 59(e) motion, Mr. Hale elaborates. The government responds that this is simply a re-hashing of Hale's original argument, which the court should not even consider, but does respond to the merits. The court will briefly do the same.

Mr. Hale's elaboration, in a nutshell, is that his defense counsel could have attempted to show that when Evola mentioned "exterminating" a "Jew rat" in a conversation on December 5, 2002, Hale understood Evola to mean attorney Amend, and not Judge Lefkow. This could have been done without conceding that Hale was

soliciting Evola to murder Amend, or agreeing with Evola in any way. This would be possible because of the evidence showing that Mr. Hale knew Evola was an informant.

The argument made in Mr. Hale's § 2255 motion was that he thought, on December 5, 2002, that Evola was announcing a plan to murder lawyer Amend (Mr. Hale says "good" after Evola said "consider it done"), but then "categorically rejected" Evola's plan when he understood that Evola meant Judge Lefkow. The court still fails to see how that argument makes sense, or has any impact, were Mr. Hale not actually agreeing with the Amend plan. Beyond that, even if the court accepts Mr. Hale's argument now that it would not have been logically inconsistent to argue that he knew the Amend plan was phony so had no need to reject it, but then categorically rejected the plan when it switched to Judge Lefkow, this still does not amount to a showing that the alternative defense, entrapment, chosen by his counsel, was objectively unreasonable. The court has examined Mr. Hale's proposed alternative defense argument at length, and explained why, based on all the evidence available, the defense strategy that was actually used was reasonable, if not better than Mr. Hale's "hindsight" defense. The court need not repeat that discussion here, anymore than it already has, but instead only states that it does not believe that Mr. Hale's RULE 59 motion has shown the court erred in this regard.

#### **IV. Whether issue regarding absence from voir dire was waived**

Mr. Hale argues that it is not clear from the record that his absence from portions of voir dire was involuntary, and so this issue could not have been raised on direct

appeal. Thus, he has not waived the issue and may raise it in this § 2255 proceeding. The government's response is that this is a new argument that cannot be made under the guise of a RULE 59 motion; and that it rests on the substance of its prior response to the issue as raised in Mr. Hale's § 2255 motion.

The government is correct that Mr. Hale is attempting to amend his § 2255 motion and make a new argument. In his initial motion he attempted to avoid waiver by arguing that he is actually, factually innocent; that he had cause for not raising the argument on appeal, because voir dire transcripts were not available to him; and that in any event, his absence is a structural error which can always be raised. He made these non-waiver arguments in support of his original argument *that the record was devoid of evidence showing that he, or his counsel, consented* to his absence from voir dire. (DE # 18 at 41). Thus, the issue Mr. Hale raised in his § 2255 motion could have been raised on direct appeal, and the court's discussion of waiver was adequate and will not be reconsidered under RULE 59(e).

#### **V. Whether transcript overlooked by court merits reconsideration**

In his § 2255 motion Mr. Hale argued that his attorney was ineffective for not offering exculpatory evidence including a comment he had in Evola's presence that he wished Ben Smith had shot him (Hale) in the leg instead of going on a multi-state shooting spree targeting, and killing, several non-Caucasian individuals. (DE #18 at 25.) In rejecting this argument, the court noted that because Mr. Hale did not testify, the evidence would have had to come in through Evola, and nothing could have been done

if Evola denied that Hale made the remark. In his RULE 59(e) motion, Mr. Hale points out that the court overlooked a transcript of conversation which Evola recorded, containing the remark, which could have been used to confront Evola on the witness stand.<sup>10</sup>

As the government argues in its response, the entire context of the remark makes Mr. Hale's argument based on it almost ludicrous. In the conversation, Mr. Hale is recounting that he told someone "with absolute sincerity and conviction" that he wished Smith had shot him in the leg, and that he:

[M]eant it actually. In a sense . . . you know, because I think it has hurt us in some ways plus he'd be alive if he had shot me in the leg. . . . [A]nd maybe I'd have my law license right now. There wouldn't be these lawsuits against us right now. . . . And they nodded their heads, you know, and there was nothing else they could say but if I had said well, well, he shot a couple, you know, mud people, who cares? . . . You know they would definitely, definitely want to use that against me, say that I don't have good moral character, you know?

(DE # 8-4 at 69.) This is not a condemnation of the violent acts committed by Smith, it is instead, just as the government states, a "pragmatic analysis of the consequences of Smith's murderous spree." (DE # 58 at 12.) Considering the other evidence in this case (including the portion of this conversation where Mr. Hale laments that it would have been "held against him" if he had said that Smith shot "mud people, who cares") shows

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<sup>10</sup> In his § 2255 motion Mr. Hale did not provide a specific cite to this information, leaving the court to ferret it out on its own. As is now clear, it appears at DE # 8-4, page 69, but as addendum # 3 to DE # 8 when viewing the docket text. This explains Mr. Hale's and the government disagreement in correctly identifying it. The confusion in numbering results from a glitch in the CM/ECF system which, the court believes, has been corrected in subsequent versions.

that there is no likelihood whatsoever that this evidence would have impacted the outcome of the trial. Although the court did in fact overlook the transcript previously, considering it now does not give the court pause or any reason to reconsider its prior ruling.

#### **CONCLUSION**

For the reasons above, Mr. Hale's motion pursuant to RULE 59(e) (DE # 52) is **DENIED**. The court reaffirms its decision (DE # 50) denying Mr. Hale's § 2255 motion, and denying him a certificate of appealability.

**SO ORDERED.**

Date: October 27, 2011

s/James T. Moody  
JUDGE JAMES T. MOODY  
UNITED STATES DISTRICT COURT